

**Cliffstar Transportation Co., Inc. (Star Cos., Inc.); Cliffstar Corporation; Cinco, Inc.; and Edgewater Transport Systems, Inc., Single Employer and Teamsters Local Union No. 649, affiliated with International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Case 3-CA-15139

May 21, 1993

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On June 12, 1992, Administrative Law Judge Robert G. Romano issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief,<sup>2</sup> and the General Counsel submitted an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions<sup>4</sup> and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cliffstar Transportation Co., Inc. (Star Cos., Inc.); Cliffstar Corporation; Cinco, Inc.; and Edgewater Transport Systems, Inc., single employer, Dunkirk, New York, its officers, agents, successors, and assigns, shall pay to the discriminatees the amounts set forth opposite their names in the judge's decision.

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International.

<sup>2</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>4</sup> We note that the Respondent, for the first time in its exceptions here, has argued that the Board should toll the backpay for discriminatee Robert Bush during the period that Bush spent in the hospital and convalescing from a nonwork-related illness. Because the Respondent did not make this argument to the judge, it effectively chose not to litigate the matter. We reject its contention on timeliness grounds. In adopting the judge's determination regarding the method of calculating discriminatee Gerald Small's interim earnings, we stress, as did the judge, that the Respondent failed to present any alternative basis for calculating Small's interim earnings for January 1990 in response to the General Counsel's employment of a method of pro rating them based on the entire calendar year.

*Doren G. Goldstone, Esq.*, for the General Counsel.  
*Stephan J. Boardman, Esq. (Arent, Fox, Kintner, Plotkin & Kahn)*, of Washington, D.C., for the Respondent.  
*Ferdie Tanner*, Secretary-Treasurer and Business Agent for the Charging Party.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. I heard this case in Buffalo, New York, on April 1-2, 1991, based on a compliance specification and notice of hearing which the Regional Director for Region 3 of the National Labor Relations Board (the Board) issued on February 12 (amended March 26), 1991, and as further amended at hearing.<sup>1</sup>

The compliance specification is based on an earlier Board Decision and Order of July 12, 1990, which issued on a formal settlement stipulation entered by the parties before an administrative law judge, and which as approved by the Board, provided for a consent order of the Board and an entry of a consent judgment. A related judgment of the Second Circuit Court of Appeals issued in Civil Case No. 90-4169 dated December 6 (mandated December 7), 1990 (unpublished).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent Employer on or about May 14, 1991, I make the following

### FINDINGS OF FACT

#### I. BACKGROUND

In prior proceedings, the complaint alleged, the Employer admitted by withdrawal of answer and/or otherwise by stipulation, and the Board found that Cliffstar Transportation Co., Inc., by name change (in December) Star Cos., Inc. (CTC), Cliffstar Corporation (Cliffstar), and Cinco, Inc. (Cinco) had all operated in material times as a single integrated business enterprise, and that since December (sic), Edgewater Transport Systems, Inc. (Edgewater) had joined them as an affiliated business and held itself open to the public as a single integrated business enterprise with them.

Therefore, on April 10, Local 649 had been certified as the exclusive collective-bargaining representative of the following CTC unit of driver employees found appropriate for collective bargaining:

All full time and regular part-time drivers, including all road, city, local and yard drivers employed by CTC at its One Cliffstar Drive, Dunkirk, New York location, excluding all other employees, professional employees, guards, and supervisors as defined in the Act.

In all material times, Cliffstar has been engaged in the manufacture of canned fruit juices and frozen fruit concentrate, and Cinco has been engaged in the business of brokering freight transportation. Each company had an office and place of business at Dunkirk, New York, where CTC was (first) engaged in the interstate transportation of general commodities, including food products for Cliffstar (and Ral-

<sup>1</sup> All dates are in 1989 unless otherwise indicated.

ston & Purina) through October 6, as thereafter was Edgewater, without interruption (albeit from a different business location in Dunkirk, one shared with Cinco).

In that regard, on June 6, Respondent CTC, by letter, informed the Union that CTC had unilaterally decided to “liquidate” its transport operation and sell its trucking operation to Edgewater which action would thereby result in the termination of employment of employees in the above CTC unit and also in the elimination of the CTC unit. On August 17, the Union filed the underlying charge. On October 6 (Friday), CTC permanently laid off and/or terminated the employment of all its employees in the above unit. On October 9 (Monday), Edgewater took over all CTC transportation functions.

In addition to finding Edgewater an affiliated, integrated business, and a single employer (below), the Board also found that since December the following Edgewater unit constituted a unit appropriate for collective bargaining:

All full time and regular part-time drivers, including all road, city, local and yard drivers employed by Edgewater at its 425 Main Street, Dunkirk, New York location, excluding all other employees, professional employees, guards, and supervisors as defined in the Act.

Indeed, the parties have stipulated that Stanley Star, sole owner of CTC, Cliffstar, and Cinco purchased Edgewater on February 7, 1990 (in circumstances more conveniently to be described further below). The Board found all the companies constituted a single employer, and all to be employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Board found Teamsters Local Union No. 649, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 649) is a labor organization within the meaning of Section 2(5) of the Act.

In addition to ordering that the Respondent Company cease and desist from engaging in related, multifaceted violations of Section 8(a)(1) and (3), including discriminatorily threatening that their business will be closed, or their employees will be discharged or suffer other reprisals, and also from discriminatorily discharging employees, the Board ordered Respondent Company affirmatively to:

(a) Reestablish the trucking operations of the Respondents and restore the work formerly performed by the terminated CTC Unit employees.

(b) Offer all CTC Unit employees who were terminated as a result of the Respondents’ closure of the CTC facility, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits resulting from their discharge, less any net earnings, plus interest. [Interest footnote omitted.]

...  
(f) Make whole Eugene O’Conner for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest. [Footnote omitted.]

## II. THE EVIDENCE

### A. First Principles Well Established

Broadly governing first principles are well established. The finding of an unfair labor practice is presumptive proof some backpay is owed, *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel’s burden in a backpay proceeding is “to show the gross backpay due each claimant,” *J. H. Rutter-Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230 (5th Cir. 1973), i.e., the amount the employees would have received but for the employer’s illegal conduct, *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 544 (1943).

The burden is then on a respondent to establish any affirmative defenses that would mitigate its liability, *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); namely, present unavailability of jobs, the amount of any interim earnings that are to be deducted from backpay amount due, and any claim of willful loss of earnings, *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). The burden includes showing a backpay claimant incurred a willful loss of earnings by refusing to take new employment or by neglecting to make reasonable efforts to find interim work, *Inland Empire Meat Co.*, 255 NLRB 1306, 1308 (1981), enf. mem. 692 F.2d 764 (9th Cir. 1982). An employer may mitigate its backpay liability by showing a discriminatee has “willfully incurred” a loss by a “clearly unjustifiable refusal to take desirable new employment,” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).

Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances, *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980). The Board’s discretion is broad in its selection of a backpay formula that is reasonably designed to produce approximations of backpay due, *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970). When presented with both backpay and alternate backpay formulas, an administrative law judge must determine which is the “most accurate” method to determine backpay, *W. L. Miller Co.*, 306 NLRB 936 (1992). Finally, it is also well established where there are uncertainties, or ambiguities, they are rightfully to be resolved in favor of the wronged party, rather than the wrongdoer, *Iron Workers Local 15*, 298 NLRB 445 (1990); *WHLI Radio*, 233 NLRB 326, 329 (1977); *United Aircraft Corp.*, 204 NLRB 1068 (1973); and *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572–573 (5th Cir. 1966).

### B. The Offer of Reinstatement

Though Star’s purchase of Edgewater stock apparently actually took place on February 5, 1990, by an earlier letter dated January 17, 1990, Edgewater had notified each of the former CTC employees (with courtesy copy to the Union) that CTC had acquired Edgewater and was resuming CTC’s trucking operations through that company. The letter set forth a reinstatement offer as follows:

We are writing to offer you full and immediate reinstatement to your former position, without prejudice to your seniority and all other rights and privileges, in-

cluding the compensation and other benefits which you enjoyed as an employee of CTC, Inc.

It is requested that you advise me of your intent to return to work, in writing or by telephone at your earliest convenience.

### C. The Issues Stated in Context

#### 1. Employer's primary claim that CTC's discriminatees have failed to adequately mitigate losses

On April 20, 1990, Respondent entered the above settlement stipulation which contained backpay provisions for making full remedy of the unfair labor practices. Nonetheless, Employer now *primarily* contends that all the former CTC drivers are not due any backpay because they have failed to mitigate their damages by failing to accept the employment at their same jobs that was timely offered them by another company.

On September 11 a certain meeting of CTC employees had been held at which a personnel leasing company, Vanguard Services, Inc. of Indianapolis, Indiana (Vanguard), offered employment under certain stated qualifying conditions to all CTC unit employees to do the same driving unit work, with the same equipment, for the same customers, but to do so as new employees of Vanguard who were to be then leased as drivers to Edgewater. That Vanguard employment offer is presently noted to constitute the sole basis for the Employer's *primary* claim made here that discriminatees have not properly mitigated their damages, and only to be excepted (at best) are four former CTC discriminatees (P. Calato, D. DeGolier, R. Gehling, and J. Rumsey), who were employed by Vanguard.

The parties have a correlative dispute over whether Vanguard had offered wages, hours, and working conditions which were, if not on balance superior, in any event so substantially equivalent, as to obligate (then) CTC employees to apply for future employment with Vanguard to provide its driver service to Edgewater, at the risk otherwise of a forfeiture of backpay for their failure to substantially mitigate losses by failing to take substantially equivalent jobs offered by Vanguard. These primary issues are more conveniently addressed and resolved after all corporate activity evidence is marshaled in connection with the circumstances bearing on group 3 below, though I presently find for reasons set forth below, the primary contentions of Employer are without merit.

#### 2. The parties are in basic agreement on the backpay formula

Apart from disagreements on length of backpay periods of three different groups to be discussed below, the parties appear in basic agreement, and I find an appropriate measure of backpay for each discriminatee is one based on the employee's average weekly salary at the time of the discriminatory discharge by CTC, multiplied by the number of weeks by quarter, in the backpay period when determined. The parties have agreed an individual discriminatee's average weekly earnings is established by a calculation of the average weekly earnings for the weeks each individual had respectively worked for CTC in 1989. The parties also are in agreement on the accuracy of the specified amounts of aver-

age weekly earnings set forth in compliance specification, as amended, and as further amended at hearing.

An appropriate formula then for establishing quarterly gross backpay for the 29 named discriminatees for whom some backpay is claimed is to multiply an employee's agreed average weekly earnings by the number of weeks for which backpay is determined due for each employee, including any bonus, and other benefits where appropriate, in each calendar quarter during the determined individual backpay periods. In that regard, at hearing, the Company admitted the claim of a \$1000 bonus due David Sikorsky (group 2, below) in the fourth quarter 1989 was valid. Because the compliance specification otherwise has raised no other claim of bonus (or specifics of vacation and holiday loss) to any employee, such benefits need not be further considered in establishing gross backpay that may be due the discriminatees. There is also no claim of loss advanced on pensions. However, medical claims for medical expenses and claims for insurance premiums recovery and offset are made, and they are handled separately below.

#### 3. The basic issues on length of backpay period

The parties are in agreement: CTC shut down on October 6; Edgewater took over on October 9; and Vanguard thereafter leased drivers to Edgewater, to do the driver unit work, without any interruption of the Employer's business. At hearing, the parties agreed the backpay period begins on October 7. They are secondarily in major dispute on when the individual backpay periods have ended, joining issue over the length of backpay period in (essentially) three groups.

##### a. The three groups, generally

General Counsel in the compliance specification essentially contends backpay period ended: (a) for a first group of 11 employees on January 21, 1990; (b) for a second group of 9 employees essentially a week later on January 29, 1990 (for several reasons); and (c) for a third group of 8 employees on February 24, 1990, because they were *not* fully reinstated until then.

General Counsel has conceded the backpay period of one remaining employee (Jesse Lamphere) had ended earlier on December 24, and Employer agrees that if any backpay is due Lamphere, it ended then.

Although the Employer has thus *secondly* contended broadly that Employer's backpay liability ended when it had first offered reinstatement to all the discriminatees on or about January 19 (sic), 1990, Employer admitted in its answer otherwise (and presently contends) backpay liability, if any, for all the employees (other than Lambert) ended on January 21, 1990 (Sunday).

##### b. Group 1, backpay period ending January 21, 1990

To the extent Employer contends that backpay period ends on Employer's offer of reinstatement (by letter dated January 17 or on January 19, 1990), I reject the claim and, to the contrary, I find, in basic agreement with General Counsel, Board precedent provides that when an offer of reinstatement is made, discriminatees must have a reasonable period to consider whether to return and, in that context, it is settled that "backpay is tolled on the date of actual reinstatement, on the date of rejection; or in the case of those who did not

reply, on the date of the last opportunity to accept.” *Southern Household Products Co.*, 203 NLRB 881, 882 (1973). However, an allotted time to effect return must be reasonable under the case circumstances, *Neeley’s Car Clinic*, 255 NLRB 1420, 1422–1423 (1981). (There an offer limited to report to work in 5 business days was not enough in not allowing a discriminatee time to give a reasonable notice to an interim employer.)

Although Employer contends the backpay period for discriminatees ended on January 21, 1990, it does so for a reason General Counsel has contested successfully. Somewhat inconsistently then, General Counsel would rely on a claim that Employer effectively admitted that the first group’s backpay period ended on January 21, 1990.

In any event, Employer’s record made of the employees’ responses and returns shows all the employees named in group 1 but one (T. Beebe) had reported in the *workweek* beginning on January 22, 1990 (Monday). Employer contends all employees in group 1 had arranged report dates of January 22 or 23, 1990. Indeed, Conlin has testified credibly he kept his related records contemporaneously. Conlin’s records show, though most (7 of 11) of group 1 actually returned then as they had arranged with him, 4 others (with asterik below) did not. The group 1 employees, with agreed average weekly earnings, and with *actual* return time according to Conlin’s testimony/records, are:

<i>Name</i>	<i>Return Date</i>	<i>Avg. Weekly Earnings</i>
Beebe, Timothy	* 1–29–90	\$702.45
Bush, Robert	1–22–90	846.20
Degolier, Dennis	1–22–90	720.30
DiPietro, Louis	* 1–24–90	473.20
Hall, Carter	1–22–90	749.33
Keefe, Kevin	1–23–90	457.90
Nephew, Marvin	* 1–24–90	700.58
O’Connor Eugene	1–22–90	522.53
Piazza, Mark	* 1–24–90	740.35
Rumsey, John	1–23–90	614.15
Sutter, Roger	1–22–90	748.00

*Actual return date* in group 1 displayed above appears as it was personally compiled in Conlin’s records of his communications with employees (R. Exh. 6). If it does not appear in review clear that Conlin’s record of such qualifies as a compilation exhibit in its entirety, in not being entirely compiled by him from the Company’s records, it appears no less reasonably inferable of record that the above return dates are shown as they are to be found on Employer’s payroll records. Thus, although Conlin testified he contemporaneously entered the date an employee had *actually* returned to work on either a direct observance of it and/or on internal report of some subordinate, Conlin testified Employer’s payroll records would support the same, which Employer later offered to make available to General Counsel. Conlin has also compiled a record of when the employee *said* he would return, but which was deemed susceptible of being of a self-serving nature. Conlin’s record thereof was found otherwise competent in service to Conlin, if needed to refresh Conlin’s recollection in testifying thereon (as it was). Moreover, under the described circumstances Respondent’s Exhibit 6 is also to

be independently deemed competent evidence in the form of Conlin’s past recollection recorded.

The discriminatees appearing in group 1 without an asterik by their name actually returned on the date set opposite their name, as elected by them and agreed with Conlin. The four names with asteriks not only denote instances where the actual return date was later, but also not as agreed, i.e., not the same as Conlin’s note of the employee’s arranged report date. The four are discussed below.

Though General Counsel has contended, and I agree, that any ambiguity on report dates that may exist between Respondent Employer’s recorded account of employees’ return and an employee’s account of his return should be resolved in favor of an injured party (employee), only two discriminatees (in all) have testified, namely, former CTC employee and Union Steward Louis DiPietro and former CTC employee Gerald Small, though Small has testified primarily on his self-employment business. DiPietro testified as union steward and in regard to certain activity of some others, without support of notes, which is considered below in full. Apart from DiPietro’s testimony, General Counsel has relied on purported variances from Conlin’s contemporaneous record (R. Exh. 6), as they are found to arise when comparison is made with another exhibit (G.C. Exh. 9) which was earlier submitted by Respondent during General Counsel’s investigation.

In so far as an application of General Counsel’s Exhibit 9 data is to be made to group 1, a commonly indicated return-to-work date of January 27, 1990, therein does not persuade to the contrary of Conlin’s personally kept and more definitive daily record of the discriminatees actual return, but rather the commonality of that date’s appearance (in G.C. Exh. 9) in this record more persuades there is there likely repetitive use of a common payroll week ending date (i.e., Saturday, January 27, 1990) which is then only the more notably compatible with Conlin’s personally kept record, especially with the elapsed weeks in General Counsel’s Exhibit 9 also shown as 15, thus confirming the same period through January 21 as backpay period ending date, albeit the weeks are not there broken down in the required “*Woolworth Quarter*” (1989–fourth quarter 12, and 1990–first quarter 3).

Finally, the General Counsel does not appear to seek any additional 1- (or 2-, or 3-) day claim in the compliance specification (as amended), or in brief, for any of the (six) group 1 employees whose indicated return by Conlin’s record is after January 22, 1990. Rather General Counsel’s position is continued in brief on the above-stated (practical) grounds that Employer’s position is such as to (essentially) agree backpay period for *all* the group 1 employees ended on January 21, 1990. Thus, drivers in group 1 appear (necessarily) viewed by the parties as timely reinstated in the week following their receipt of the letter of reinstatement, whether returning to work the early part of that week as arranged, or simply reporting 1–2 days later than they had agreed, excepting only T. Beebe.

Other facts established concerning this group 1 appear wholly supportive. The Employer’s business in large measure involves over-the-road dispatch that occurs on varying days. Conlin’s personal records of employees’ receipt of the letters of reinstatement, based on his recording of the dates of signed, postal return receipts (which the Employer also offered to make available to General Counsel) establish that all

the discriminatees (including DiPietro) in group 1, except for T. Beebe, had promptly received the Employer's letter of offered reinstatement on Thursday, January 18, 1990 (as had 23 discriminatees in all that day). I am thus wholly persuaded that the employees named in group 1 had prompt receipt of the Employer's written offer of reinstatement dated January 17, 1990, and, as promptly, all the above group 1 discriminatees communicated with Employer and arranged for their return on either January 22 (Monday) or 23 (Tuesday), 1990. Conlin has there recorded even T. Beebe had responded on January 20, 1990, and that T. Beebe had agreed he would return on January 23, but did not actually return (to payroll) until January 29, 1990 (or later). However, T. Beebe was already driving for Edgewater.

In that regard, though there is some conflict in the evidence over whether T. Beebe was employed as an employee of Vanguard or Shanlor Trucking (Shanlor), there appears to be no dispute about his being leased to Edgewater and already working as a driver in this period (below). Shanlor is another company that leased a few drivers to Edgewater, with some indication of record that T. Beebe was one. Unlike Vanguard, Shanlor leased some trucking equipment to Edgewater, though CTC subleased by far most of the trucking equipment to Edgewater, below. However, certain testimony of Ronald Robinson, a Vanguard officer, would more indicate T. Beebe was employed by Vanguard and that Vanguard had leased him to Edgewater as a driver at the time.

Although DiPietro's recollection of his own personal receipt of a letter of reinstatement was that he had received *his* letter on January 19, 1990, though Conlin's record indicates January 18, 1990, DiPietro has in practical effect confirmed Conlin on employees' having early notice. DiPietro thus testified that because DiPietro was steward, he received a number of calls from certain other former CTC drivers who had received their letters on January 18, 1990 (Thursday). DiPietro then advised all the employees who had called him on this matter to go to Edgewater the following day and see what it was about, as did DiPietro himself.

Indeed, DiPietro relates a group of some 12-15 (including DiPietro) went out to Edgewater on January 19, 1990 (Friday). DiPietro recalls they went into Conlin's office in groups of three or four, and that Conlin asked (seemingly) DiPietro's group, when they would be available to return. (DiPietro didn't recall which two or three drivers had gone into Conlin's office with him on Friday.) DiPietro, who at this time was not working, responded, immediately, DiPietro meaning Monday, January 22, 1990, which DiPietro identified as the first available workday.

In any event, DiPietro then significantly recalled Conlin told them to come in on Monday. (It is reasonably clear Conlin told all them the same thing. Thus, DiPietro has testified he made arrangements with 12-15 to gather at his house over the weekend, and they then arranged to gather for coffee on Monday morning before they returned to Employer.)

On Monday, DiPietro and 12 others (whom he specifically named) returned in a group together. Only 6 of the 11 in group 1 were amongst the 12 who returned with DiPietro on Monday. However, five of those named are shown by Conlin record as actually returning to work on Monday, January 22, 1990. DiPietro relates when the group of 12 (13 including DiPietro) came in together, Employer's Carol Iden handed them stacks of paper to fill out. According to DiPietro his

group then had to fill out "tons of paper work," including applications (though conceding), to update their DOT files and to make out logs. Thus, Edgewater's president Conlin has testified relatedly and credibly that, in so far as he knew, former CTC drivers (discriminatees) were *not* required to fill out new applications, except those required to do so to update their DOT files. (There is no evidence, nor contention, to the contrary.) When CTC drivers finished their required paperwork, they handed it back in to Iden who then reviewed it all to make sure that it was done correctly.

DiPietro appears to have asserted generally (at least), at one point, that there was no work assigned Monday to the employees, and he related they hadn't discharged the Vanguard drivers who were still working. DiPietro also recalled he brought a 13th CTC employee, William Ulrich, in that afternoon, assertedly because Ulrich wanted his steward present when he returned. However, Ulrich is a group 2 discriminatee (with backpay period as claimed ending on January 29, below), and who, according to Conlin, did not return on January 29 as he had earlier agreed, and later quit on February 5, 1990.

To the extent DiPietro's testimony would indicate that no one had returned to work on Monday, I simply do not credit that assertion fully. Rather, I credit Conlin's contrary account, supported as it is by his contemporaneously kept records, which I find more reliable in showing of some 15-16 discriminatees initially agreeing to return on January 22, 1990, 8 actually returned to work that day, especially with Conlin's offer to make supporting payroll available.

Indeed, there are actually nine who in that manner are shown to have worked for Edgewater on January 22. One was H. Rumsey, who was the first former CTC employee to apply for work with and be hired (in 1989, below) by Vanguard for Edgewater's work. Thus, H. Rumsey had been previously and up until January 22, 1990, employed by Vanguard as a driver examiner of drivers leased to Edgewater, under circumstances that are more conveniently to be described further below. Though H. Rumsey was a former CTC employee, he was notably *not* a discriminatee. (CTC had released him before October 7.) The four discriminatees previously hired by Vanguard and working at Edgewater returned to Edgewater's direct employ on different dates. Thus, Degolier and J. Rumsey (group 1) returned (as agreed) on January 22, and, Gehling (group 2) on January 29, 1990, as agreed. The fourth, Colato (group 3), though previously employed by Vanguard and leased as a driver to Edgewater, was apparently first directly employed by Respondent Edgewater on January 24 as a helper, under circumstances which are to be addressed in the consideration of group 3 (below).

Of the 11 named discriminatees in group 1, I presently find 5 had actually returned to work on January 22, and 2 on January 23, 1990, as agreed. Though there are four in group 1 who did not subsequently report on either January 22 or 23, 1990, on the basis of Conlin's testimony and/or his records, I find they also had agreed to report then. The circumstances of Union Steward DiPietro presently aside, 1 of the (then) remaining 3 in group 1 (Piazza) that Conlin effectively testified agreed to return on January 22, but who did not actually return until January 24, 1990, was *not* amongst the 12 named by DiPietro as having arrived in a group with DiPietro on Monday. Piazza's arrangement was thus far more

likely made directly with Conlin, and (I find) it was to return earlier and Piazza then actually returned 1–2 days later, as Conlin's records and testimony more credibly reflect. The second discriminatee (M. Nephew) was recalled as amongst DiPietro's group, but he did not testify, and DiPietro did not specifically testify M. Nephew did not work on January 22, 1990. In any event, I conclude and find Conlin's evidence has more credibly shown M. Nephew as one of the five of DiPietro's group who had actually returned to work on January 22, 1990.

The third, T. Beebe, though shown by Conlin's records as having agreed to return on January 23, but as actually returning on January 29, 1990 (or later), had previously been working on Edgewater work (whether as noted, he did so as a leased employee of Vanguard or Shanlor). In any event, the General Counsel appears to have advanced no claim for T. Beebe, beyond a backpay period ending January 21 in the compliance specification (or as amended), at hearing, or in brief, whether on that practical account or otherwise.

CTC *over-the-road* drivers were dispatched by seniority and basically paid a mileage rate for miles they drove. DiPietro however was one of seven local yard drivers, six being located at Edgewater, and one at the Ralston and Purina yard. Yard drivers generally received an hourly rate for the time they worked in the yard. Though Conlin's record shows DiPietro's not returning until January 24, DiPietro in contrast testified he was pretty sure he had actually returned to work a day earlier, thus on Tuesday, January 23, 1990. Otherwise, DiPietro related only generally that dispatcher Mike Albach told DiPietro when to come in and asked what shift he wanted.

Though DiPietro recalled asking in a Friday meeting with Conlin to return immediately, and being directed to report on Monday, it is clear that DiPietro, generally a yard driver, was also on occasion a trip driver. He and other over-the-road drivers were first required on Monday to fill out considerable paperwork before receiving any dispatch, or (at least) in DiPietro's case, any yard work assignment. The paperwork required of those reporting on Monday, in the circumstances of this case, was required of the over-the-road drivers part of whom began work that day, and others of whom General Counsel would appear to have effectively conceded went to work later, but had achieved reinstatement, and were in this earlier time engaged in preliminary record preparations for the next available dispatch. In DiPietro's case, and contrary to his recollection, Conlin's testimony was notably firm and convincing that DiPietro's return was on January 24, 1990, and it was as it was elected by him.

Credible Conlin testimony and records confirm 9 of the 11 in group 1 (who are 9 of 18 former CTC drivers overall that Conlin recorded he saw personally on January 19, 1990) came in *personally* that day to talk to Conlin, and they arranged their return. Thus, I find 7 of the 11 in group 1 had already decided to return, so notified Conlin, and had actually returned as agreed on either January 22 or 23, 1990, and I credit Conlin they had individually designated to him those respective dates as the date for their return. Moreover, on the weight of the more consistent evidence I find Conlin testified convincingly that trucks *were* available for *all* the CTC drivers whenever they had wanted to return. The fact that some Vanguard leased drivers (whether former CTC drivers or not) continued in employ in some transition period does not war-

rant contrary finding. Credited Conlin records also reflect only eight discriminatees *actually* returned to work on January 22, three more did so on January 23, and seven more did on January 24, 1990.

In other words, despite continued use of some Vanguard (nondiscriminatee) leased drivers by Edgewater, (I find) the availability of a truck, e.g., in use by a Vanguard leased (nondiscriminatee) driver, was not a factor in any given discriminatee's election for an early or later date of return. Although there was some time required on paperwork and various considerations of availability and of seniority ordered truck assignments (dispatch) to over-the-road drivers on a next available dispatch basis which may also have contributed in some instances to delay in resumed dispatch, to the extent such was present, it reasonably appears to have been so only generally as before. In regard to the minor conflict on DiPietro's return, Conlin has testified the more firmly that Union Steward DiPietro's return on January 24, 1990, was as he elected, adding specifically and convincingly, if he had wanted to return earlier, he could have, as there was work for him.

Moreover, even if I were to credit DiPietro's recollection of his return over Conlin's account of DiPietro's return on January 24, DiPietro would then place his return but a day earlier, on Tuesday, January 23, with the record showing union steward business accomplished by him for the benefit of other drivers over the weekend, the prior morning, and the afternoon. Finally, General Counsel does not appear in the compliance specification nor in brief to have advanced a claim for any day of this week, not for DiPietro, or for any individual in group 1.

Thus, on the weight of more consistent and credible evidence of record, I conclude and find as to the above named group 1 discriminatees that all the employees in group 1 had promptly received Employer's written offer of reinstatement in the period January 18–20; that they had as promptly (within the same 3 days) communicated their decision to return to Conlin; and that they all had as promptly arranged directly with Conlin an acceptable early date for their return and I thus find that all were reinstated on their elective actual return early the next week, on Monday, or Tuesday as agreed, or constructively as of the agreed date, albeit one some of them did not meet.

In short, I find vagaries of completing required driver paperwork, and choice associated with next available dispatch time for over-the-road drivers, more explain the minor (1-) day variance in the initially arranged start back dates of January 22 or 23, rather than unproven claim of nonavailability of truck, or any nonrelease of Vanguard or Shanlor leased driver. Thus I credit Conlin's firm testimony that trucks *were* available to all the discriminatees, especially with no contention of General Counsel to the contrary made on any group of employees.

Therefore, in light of the circumstances of this case showing early notice and basic agreements the discriminatees in group 1 made with Conlin for their early return, starting January 22 and 23, 1990, and especially with the General Counsel not contending nor advancing grounds for any associated partial week extension, I conclude and find employees in group 1 were effectively reinstated by their agreements with Conlin to return on January 22 and 23, 1990, *and* by their actual or their constructive return on agreed dates, and I thus

further find that their backpay period ended on January 21, 1990. I also observe all (excepting T. Beebe) actually returned within payroll week ending January 27, 1990 (below).

Accordingly, the I conclude and find, to arrive at the amount of the *gross* backpay due the discriminatees presently named in group 1, it is appropriate that average weekly earnings of group 1 employees be multiplied by 12 weeks in fourth quarter 1989 and by 3 weeks in first quarter 1990, as is set forth in the (amended) compliance specification.

*c. Group 2, with claimed backpay period ending January 29, 1990*

First, notably excluded from group 2 is Jesse Lamphere, who was initially included in group 2. General Counsel in the amended compliance specification and at hearing stated Lamphere had his backpay period (effectively) end earlier on December 24. Respondent Employer agreed at hearing, Lamphere's backpay (if any is due) would have ended then, on the basis of Lamphere's reported loss of his driver's license then, along with being charged with DWI. Indeed, Conlin testified credibly that Lamphere requested Employer make inquiry as to what if anything might be done in regard to his suspended license. When Employer made an inquiry, Employer received confirmation that it was anticipated by authorities that the charge of DWI would be prosecuted, and suspension of Lamphere's license would continue with projected DWI prosecution.

Be that as it may, no evidence is presented that Lamphere's license was ever earlier reinstated in the material backpay period. To the contrary, the continued suspension of Lamphere's license after December 24, and up to the issuance of Employer's letter of reinstatement to him, effectively throughout the remainder of Lamphere's arguable backpay period, is not contested by General Counsel. Indeed, the General Counsel concedes in brief there was an agreement on the effective end of Lamphere's backpay period on December 24 by stipulation. Accordingly, I find that the license suspension occasioned Lamphere's continued nonavailability as a driver after December 24 and throughout the remainder of his backpay period.

In light of the above showing on Lamphere's continued nonavailability as a driver for the remainder of his backpay period, especially where there is no claim otherwise advanced, nor does there appear on this record any grounds presented for continuation of a backpay accrual otherwise, i.e., on the basis of some unmet obligation of Employer to offer an alternative employment to Lamphere, I agree the backpay period of Lamphere effectively ends on December 24. Thus, not only is no evidence presented Lamphere had previously worked as a helper for CTC, or that CTC used a helper classification, but also, as appears in the discussion of the group 3 discriminatees (below), Edgewater had used no helper position before January 24, 1990, when it used a make-work, not regular helper position. Thus, there appears no warrant of record to conclude any backpay is due Lamphere beyond December 24. But see and compare *De Jana Industries*, 305 NLRB 845 (1991), where helper background circumstances were otherwise, and called for a reinstatement of a driver discriminatee to the lesser position of helper that did not require a driver's license.

Accordingly, I find Lamphere's backpay period interrupted with suspension of Lamphere's driving license on December

24, and the related charge of DWI, with there being no additional accrual of backpay in the excepted period starting then and continuing through the telephone response to Conlin on January 22, 1990, confirming Lamphere's nonavailability to Respondent Employer's recent offer of reinstatement. In essential agreement with the parties, I find Lamphere's backpay period, as a practical matter, ends on December 24 (11 weeks).

In regard to the remaining nine discriminatees named in group 2, contrary to Employer's claim that the backpay period for this group also ended on January 21, 1990 (even, e.g., following receipt of Employer's reinstatement offer), existing Board precedent allows discriminatees a reasonable period of time to decide if they wish to return, when the required offer of reinstatement is made. In that context it states, "[B]ackpay is tolled on the date of actual reinstatement, on the date of rejection; or in the case of those who did not reply, on the date of the last opportunity to accept." *Southern Household Products Co.*, 203 NLRB 881, 882 (1973). In the present case, there was no last date to reply stated in the Employer's letter of reinstatement.

General Counsel submits that a period of approximately 10 days (presumably, on receipt of offer) is a reasonable time to be applied as a (seemingly) last opportunity to accept and arrange report, where none is stated. The General Counsel submits, for group 2 discriminatees who reported within 10 days on January 29, 1990, as agreed, backpay ends then. For those who were to report then or later, but only quit later, General Counsel would end their backpay on January 29, 1990, also.

Thus in brief, General Counsel observes Employer's January 17, 1990 offer of a full and immediate reinstatement did not provide any date on which the employees were to report their willingness to work, nor did it state any date on which their employment must commence. Rather it had simply requested the employee advise the Employer of the employee's intent to return at his earliest convenience (above). Conlin confirmed it was done that way for the employee's convenience, and he was not expected to start immediately. However, Conlin kept records showing the date of an employee's actual receipt of the Employer's offer, his response, and the date of his agreed and actual return.

The underlying circumstances of this case are supportive of a use of a 10-day period as a reasonable period for discriminatees to respond in the sense there was an early notice of the offered reinstatement to *all* discriminatees effected (between January 18–20, 1990), and there was prompt reply by all of them, of even time, and with no circumstances presented in this case as fairly calling for a needed longer period *to report and arrange a return*. Whether an evaluation is made of the entire 36-man unit to whom letters of reinstatement were sent, or the 29 here for whom some backpay claim is being made, or restrictively of the 9 presently considered, all the discriminatees had early notice by January 20, 1990.

Thus of the some 36 letters of reinstatement that were sent out on January 17, 1990, to the *entire* former CTC unit, Conlin record shows 23 discriminatees (or their agents) signed as receiving the letter promptly on January 18; 2 on January 19; 2 on January 20; and on the 9 for whom Conlin did not (at least) make entry of the date of receipt of a signed postal return receipt, it is no less clear they had also

received prompt actual notice, from their recorded responses to Employer. (Conlin recorded that two of those nine responded to him on January 18; five had on January 19; and the last two on January 20, 1990.) Stated another way, of 29 discriminatees for whom *some* backpay is claimed due to make them whole, 21 had signed for receipt of reinstatement letter on January 18, and 1 had on January 19, 1990, and of the remaining 7 for whom there is at least no record of signed postal return receipt recorded, 1 of 7 had responded on January 18, 4 had on January 19, and 2 on January 20, 1990. Finally, and most pertinently, of the nine employees in group 2, seven had signed on January 18, and the remaining two had actually responded on January 19 and 20, 1990; and overall one had responded to Conlin on January 18, four on January 19, and four on January 20, 1990.

General Counsel has strong support in the circumstances of this case for the norm advanced, namely, all discriminatees had early notice of the letter that offered them reinstatement, and all had promptly responded to Respondent Employer about it. In raising, then (essentially) waiving in the circumstances of this case, (a) any claim Employer's offer of reinstatement was defective on basis of an indefinite reply requirement, and (b) (claimed) requirement that the date that an employee called to decline employment should *normally* be the date on which backpay period is tolled, General Counsel nonetheless submits, in the circumstances of this case, that backpay period of *all* discriminatees in group 2 is appropriately to be ended on January 29, 1990.

An allowance of a period of 10 days for response by discriminatees with timely notice (as shown here) does compare favorably with a reasonable amount of time heretofore allowed for last opportunity to reply, i.e., when it had been set forth definitively in writing by an employer in letter offering reinstatement, *Southern Household Products*, supra, 203 NLRB at 882 (where the discriminatees were directed by letter dated April 7 to reply and notify the employer of their position concerning reinstatement not later than April 18); cf. *American Mfg. Co. of Texas*, 167 NLRB 520, 521 (1967), and see cited *Eastern Die Co.*, 142 NLRB 601, 604 (1963), enf'd. 340 F.2d 607 (1st Cir. 1965). But also see and compare *Bob Maddox Plymouth*, 256 NLRB 813 (1981), where a longer period to effect reinstatement return may be found reasonable, if other circumstances present warrant (e.g., a month where interim earnings were still being earned).

The circumstances of discriminatees named in group 2 are somewhat varied, but the facts of this group, for the most part, are not in dispute. As shown below, four actually reported to work on January 29, 1990, as agreed (with Conlin), and it is readily clear under the above Board precedent, ending their backpay on that date is appropriate. One other (Small), who had promptly responded, and who had also initially agreed to report on January 29, 1990, called that day, and declined the job offer (quit, as shown by a Q, below).

Small was then (and had been for some time) self-employed in the trucking business. The interval between, on the one hand, Small's receipt of his offer of reinstatement (January 18) and his prompt initial response (January 20, 1990) arranging for his return on January 29, 1990, and on the other hand, his announcement on January 29, 1990, of his decision to quit, depicts a reasonable period of time in which Small fully (re)considered the matter of his return, and notified Employer of his (final) decision not to return. Accord-

ingly, I find Small's backpay is also appropriately ended on January 29, 1990.

The main issues in this group arise in regard to the remaining four. Two (Sikorsky and Ulrich) had agreed to return, but later declined job offers (quit). (All three quits were wholly voluntary.) Contrary to the compliance specification, and related contention of General Counsel, Employer contends two others (Boye and Higbee) had actually returned to work a week earlier, as agreed, along with the others already found to have done so in group 1.

Group 2 discriminatees with actual return date shown according to Conlin, and with their average weekly earnings, are:

<i>Name</i>	<i>Return Date</i>	<i>Avg. Weekly Earnings</i>
Boye, Bill	* 1-22-90	\$701.05
Gehling, Richard	1-29-90	419.83
Higbee, Leslie	* 1-22-90	537.18
Ozga, Robert	1-29-90	858.10
Sikorski, David	2-05-90 Q	774.38
Sternisha, Jeffrey	1-29-90	742.55
Ulrich, William	2-05-90 Q	789.45
Small, Gerald	1-29-90 Q	641.65
Yonkie, John	1-29-90	664.25

Ulrich, according to Conlin's evidence, had *verbally* responded to Conlin on January 19, 1990, and agreed to return on January 29, 1990. DiPietro recalled that Ulrich had *personally* reported to Conlin on the afternoon of January 22, 1990, with DiPietro present (at Ulrich's request). (DiPietro does not contest that Ulrich agreed to report on January 29, 1990.) Thus, in either event, *Ulrich failed to report for work as he had agreed on January 29*, and then only a week later, on February 5, 1990, notified Employer that he quit. In contrast, Sikorski, after verbally reporting to Conlin on January 20, 1990, and, then agreeing to report for work on February 5, 1990 (essentially in 2 weeks), notified Employer on the last day thereof that he quit, without returning.

The only other area of an arguable factual dispute arising in regard to group 2 is that the Employer has contended, on the basis of Conlin's evidence, that two (Boye and Higbee) in group 2 had actually returned a week *earlier*, thus in circumstances under which they would appear more appropriately to be included in group 1. Neither Boye nor Higbee has testified. Higbee was not named as amongst the discriminatees reporting with DiPietro on Monday, January 22, 1990; though DiPietro thought Boye was. However, I have earlier found some five others named in DiPietro's group had actually returned to work on January 22, 1990, and, in the end, I find Boye and Higbee more likely did so also.

Both Boye and Higbee are similarly shown by Conlin's evidence as actually returning to work on January 22, 1990. Although the General Counsel continues to contend in brief for a backpay ending date of January 29, 1990, for Boye and Higbee, General Counsel does so with the (apparent) sole reliance on the variance urged as generated from the Respondent's position paper presented during the charge investigation, and with related reliance on Board and court holdings that any uncertainties should be resolved in favor of the discriminatee, a principle with which I wholly agree, and would apply in appropriate circumstances.

The problem is the (backpay) position paper Respondent had presented to the General Counsel does not explicitly, or sufficiently support the variant dates claimed. Thus General Counsel's Exhibit 9 reflects Boye had returned to work the week of February 3, 1990 (compatibly showing 16 weeks elapsed), but inconsistently reflects that Higbee had returned to work the week of January 27, 1990 (and confusedly, if not also incompatibly, showing 16 weeks). Error in the position paper is obvious. Significantly, the position paper, in reflecting Higby returned to work (as was the case with certain others earlier shown in group 1) in the week of January 27, 1990 (Saturday), which I have earlier concluded represented a common week ending date in regard to others in group 1 (above), is then similarly not itself inconsistent with the weekday return day claimed by Employer, namely, Monday, January 22, that is definitively shown by Conlin's record (R. Exh. 6) as the day of Higbee's (and others') actual return to work. It is with regard to Higbee that the apparent error exists in General Counsel's Exhibit 9. Higbee's return to work on January 22, 1990, is thus more indicated by the weight of mutually consistent and more credible evidence than not.

In contrast, at least surfacedly, it would appear a potential ambiguity exists in Boye's instance. This appears to be so because the week of February 3, 1990 (also a week ending Saturday), is reflected in the position paper of Respondent (G.C. Exh. 9) for Boye's return to work, thus, a week ending date in use, that would then encompass January 29, 1990, and thus arguably tend to support the claim of General Counsel that Higbee's backpay period had ended on January 29, 1990, as would the related notation of 16 elapsed weeks in Boye's backpay period. If so viewed, it would also appear reasonably inconsistent with Employer's claimed return date of January 22, 1990, for Boye, based on Conlin's evidence of Boye's return that day. Nonetheless, for (essentially) two reasons I am persuaded in the end, and I conclude that *both* Boye and Higbee had returned to work on January 22, 1990, and, accordingly, in agreement with Employer, I find the backpay period for Boye and Higbee ended on January 21, 1990.

Thus first, it is General Counsel's burden to establish gross backpay due. A logically essential element of meeting that burden would appear to require General Counsel to have initially establish by *prima facie* evidence both the beginning and ending date of the advanced gross backpay period. The compliance specification (as amended) alleged that the General Counsel relatedly contended, but the Employer did not admit, not in answer or otherwise, that the backpay period of Bowe and Higbee had ended on January 29, 1990. Neither Bowe nor Higbee testified. Indeed, no witness has testified directly that either Bowe or Higbee had actually returned on January 29, 1990, let alone done so convincingly. Even General Counsel's Exhibit 9, on which General Counsel *solely* relies in brief, does not explicitly establish Higbee returned on January 29; nor does there appear any other credible hard evidence presented that either Bowe or Higbee returned on January 29, 1990.

In contrast, clear weight of both General Counsel's evidence (G.C. Exh. 9) and Respondent's evidence (Conlin testimony and R. Exh. 6) more establishes that Higbee and others (and unlike Higbee, with 15 elapsed weeks shown) returned on January 22, 1990. With error on its face, General Counsel's Exhibit 9 is shown less reliable. Thus, on the evi-

dence presented, I find General Counsel simply has not presented evidence sufficiently persuasive to meet the burden that either Boye or Higbee did return to work for Employer on January 29, 1990, as is claimed in the compliance specification and in brief, and is required of General Counsel to establish in the first setting the outer perimeter of gross backpay due these discriminatees.

Second, even if I were to view the February 3, 1990 date in General Counsel's Exhibit 9, in tending to support a return on January 29, 1990, as General Counsel essentially claims in urging that backpay ending date, that is a weak and strained *prima facie* showing at best and one reasonably limited only to Bowe. In stark contrast, Conlin's testimony, particularly in regard to his contemporaneously kept records in this matter (I find) was simply far more impressive, and the very state of those especially definitive records, as kept in this area, only to be deemed the more credible.

That evidence additionally shows Boye had received his letter offering reinstatement on January 18; that he had responded promptly on January 19, in person then telling Conlin that he would return on January 22, which Conlin has wholly consistently further recorded that Bowe actually did. Higbee is shown to have received a reinstatement letter similarly on January 18, but to have *immediately* verbally called that very same day. Though Conlin evidenced some failure in recalling what a Higbee (report date) note of 9 a.m., January 19 (Friday), meant, Conlin has no less convincingly recorded that Higbee actually returned to work on January 22, 1990, the next workday. In the end, I find Conlin's evidence is more internally consistent, and more persuasive. I thus conclude and find, on the weight of the more credible evidence of record, that both Boye and Higbee actually returned to work on January 22, 1990, as Conlin and his above records have persuaded.

Otherwise, in general agreement with General Counsel, especially in the light of the limited claim General Counsel advances in the circumstances of this case and, in the absence of any evidentiary circumstances appearing in the present record to warrant any further extension of an opportunity to return as necessary to effect a full Board remedy, I conclude and find where Employer, as here, has left an otherwise offer of full reinstatement open ended for the employee's convenience as to when the employee must respond, and, where all discriminatees had prompt notice of such an offer of reinstatement, had promptly responded to it, and had notified Employer of their decision to actually return on certain agreed dates, a full 10-day period (following receipt of offer) then appears as a reasonable period for the employee's decision to return or *not* to return to be *finally* determined and for an employee to notify Employer thereof, absent some specific showing there was reasonable need or some additional individual justification for a longer period to arrange, and actually return, that is not readily apparent here.

A longer period to decide to return or not to return would appear clearly not required in the instance of Ulrich, who had agreed on January 22 to return on January 29, 1990, and who not only did not return then as agreed, but also had only a week later on February 5, 1990, eventually communicated to Employer that he quit. I find Ulrich's backpay period is appropriately ended on January 29.

A closer question appears presented in the circumstances of Sikorski. Sikorski verbally communicated to Employer on

January 20, 1990, that he would return in 2 weeks, which, on its face, would normally appear as a reasonable period of time for Sikorski to have arranged for his actual return. At the end of that arranged period, Sikorski, like Small, had promptly notified Employer of his (reconsidered) decision that he would not return. (There is no evidence presented Sikorski had decided earlier that he would not return.)

However, General Counsel would set the gross backpay limit by formula use of a 10-day period, as a reasonable outer limit for a discriminatee *to respond (sic) or report* (seemingly effectuate return), i.e., within 10 days to be provided, notify Employer of a decision to return at a certain reasonable date and then return on that date, or, failing to have notified Employer of a final decision to *not* return within those 10 days, to have backpay end at end of the 10 days provided. (General Counsel in brief does not appear to otherwise explicitly state when the 10-day period is to start, though it would reasonably appear the referenced full 10-day period would appropriately start with a given employee's receipt and/or awareness of the letter of reinstatement. Thus, I proceed on the basis General Counsel would effectively end the backpay period 10 days after receipt of the offer, and toll the backpay period at end of the 10-day period where an employee does not return after that period as arranged within that period and without a timely notice of quitting registered by the employee earlier in that period.)

The General Counsel's basic position and Board precedent is clear that the backpay period does not end with mere issuance of an offer of reinstatement. (Conlin's records show Sikorski had notice on January 18 and had responded promptly on January 20, 1990.) If the backpay period for Sikorski is to be ended on January 29, it would appear clear Sikorski had 10 full days, following the evidenced notice of the offered reinstatement, to effect a final decision not to return.

In light of the apparent equal reasonableness of the General Counsel's submitted formula for determining length of the backpay period, in agreement with General Counsel, I conclude and find that, in the circumstances of this case, a period of 10 days was adequate time to allow for Sikorski to both make and to inform his Employer of his final decision *not* to return. Thus, though he may have initially presented a reasonable period to effect his return, e.g. (presumably), to accommodate giving a 2-week notice to his interim employer, Sikorski did not in fact subsequently return. Thus, I find the backpay norm reasonably advanced by General Counsel has application in such circumstances, and Sikorski's decision to not return was one that was reasonably to be finally determined by him and reported to Employer within 10 days, though the 10-day period for such a required response was not set forth in the letter of reinstatement. In essential agreement with General Counsel I find the formula advanced appears both fair and reasonable to determine the end of the gross backpay period, under all the circumstances of this case. Thus, I find Sikorski's backpay period is also appropriately ended on January 29, 1990.

Accordingly, to arrive at gross backpay for group 2 employees, including those who quit, average weekly earnings are to be respectively multiplied by a 12-week fourth quarter

in 1989, and by a 4-week first quarter in 1990, except that the backpay period of Bowe and Higbee shall end on January 22, 1990. Thus, the gross backpay of Bowe and Higbee shall be calculated on the same basis as for the discriminatees in group 1, namely, on basis of 12 weeks in 1989 fourth quarter and on the basis of 3 weeks in 1990 first quarter.

#### d. Group 3

The third group is composed of eight (former CTC) drivers, who were at first rehired as helpers (in either week of January 22 or 29, 1990), and employed as helpers until February 24, when the Employer finally reinstated them by inserting them into normal rotation as drivers. Of these, the compliance specification conceded discriminatee Wayne Nephew had an excepted period from October 7 to November 11. The parties are thirdly in basic dispute in regard to backpay for this group on the Employer's proffered defense Edgewater hired this group of drivers initially as helpers in January because they were not insurable as drivers before February 24, 1990.

These eight former CTC drivers (four of whom were notably interimly employed by Vanguard or Shanlor and leased to Edgewater) were told by Respondent Employer on their return to work directly for Edgewater that they could not drive their trucks because of certain insurance problems (below), but they could return to work as helpers, and would be paid at (as Employer contended) their own old CTC drivers' mileage rate. (Whether former CTC driver T. Beebe worked for Vanguard, or Shanlor at this time, Edgewater made inquiry on Timothy Beebe, as well as the others, in regard to insurability, as discussed further below. However, T. Beebe's only apparent MVR was one involving a traffic device in 1987. In any event, Timothy Beebe was *not* a driver restrictively hired as a helper, and thus does not appear in group 3.)

While employed as helpers, the eight drivers were assigned to work only as helpers with other drivers. Their assigned job was to ride with a driver and, on occasion when the driver was required to load, or unload, to assist the driver. In many instances warehouse employees at the point of delivery would unload the trucks but, in others, the drivers must do so. However, Conlin testified credibly that it was (basically) a make-work situation. (The record is clear neither CTC nor Edgewater had used helpers before 1990.) The eight group 3 drivers started back driving on February 24, 1990, when Edgewater inserted them back in their seniority position and no longer used them as helpers.

Employer rightly viewed the above helper work as make work. General Counsel no less contrarily contends Employer has failed to show these eight drivers were uninsurable, apart that is, from the course of conduct effecting the prior discrimination and, consequently, General Counsel contends Employer has failed to fully reinstate the eight discriminatees in group 3 until it employed them as drivers on February 24. Shown with average weekly earnings, agreed date of first employment by Edgewater as helpers, *and* with stipulated helper related difference in earnings shown on that account, they are:

<i>Name</i>	<i>Avg. Weekly Earnings</i>	<i>Helper Hire Date</i>	<i>Difference</i>
Beebe, Arthur	\$775.40	1-22-90	\$775.46
Calato, Phillip	623.80	1-24-90	1,111.00
Dale, Daniel	708.10	1-29-90	789.32
Gregory, Robert	917.95	1-25-90	781.80
Nephew, Wayne	357.15	1-23-90	0.00
Reed, James	488.00	1-24-90	0.00
		(as amended)	
Shuart, Dennis	712.58	1-24-90	789.32
Tenamore, Russell	771.43	1-24-90	993.29

Mileage rates paid the CTC drivers varied on length of service. However, the eight employees in group 3, though initially reemployed as helpers, started back at the same mileage rate of pay that they were earning as drivers prior to their discriminatory termination by CTC in October. Nonetheless, because of the effects of other factors, it is apparent from the above differences that all but two earned less as a helper than they would have earned on a continued projected basis of their prior average weekly earnings as a driver. (E.g., the route selection or trip dispatch is by seniority. Though in some instances the former CTC drivers who were employed as helpers were allowed to run with whom they wanted, in other instances Edgewater assigned them. With minor exception, the helper then remained with the driver as initially chosen or assigned.)

Respondent Employer's defense in hiring these eight former CTC drivers as helpers is solely that the eight employees named in group 3 were uninsurable as drivers because of their history of prior disqualifying motor vehicle reports (MVRs) at the time that Edgewater reemployed them in January 1990 as helpers. The Employer's argument does not rest on any of these drivers' having in the interim created or added to a bad driving record. The argument rather rests on the contention that the Employer had in the interim changed its insurance carrier, the new carrier had recently reviewed the drivers' records, and the carrier had determined those with unacceptable records would be too high a risk. Although Edgewater concedes none of CTC's former drivers were refused insurance coverage prior to the determined unfair labor practices, Respondent nonetheless argues that all this (change) would have occurred regardless of the discrimination earlier practiced against them.

On the entire record as is related thereto, I simply am not persuaded that Employer has sufficiently shown that would have been the case, especially where it appears that, though there was (at best) some difficulty experienced by Edgewater in making inquiry to assure that the required insurance coverages would continue, when the prior (single Employer) purchasing power of Cliffstar is once again practically engaged, all the required insurance coverages were promptly again arranged that enabled employment of these eight drivers, as they had been prior to Edgewater's taking over CTC's trucking operations. Moreover, I am not persuaded and I do not find that Edgewater was acting independently of CTC (or of the single Employer, including Cliffstar, as earlier found) in seeking to obtain or continue required insurance coverages nor in retaining the Employer's insurance broker the Kreiner Company (Kreiner) to do so for it.

The record reveals Cliffstar, with a little over \$100 million in annual sales in material times, has regularly employed approximately 300 employees in its operation of 2 plants in multiple buildings located on 20 acres in Dunkirk, New York. In comparison, Edgewater had sales in the amount of \$9 million. At the time of CTC's shutdown of its transport operations on October 6 (Friday), CTC had employed approximately 37 drivers in the above unit represented by Union, 7 of whom were yard drivers, though 3 (additional) yard drivers had only (apparently) comparatively recently been laid off. Edgewater currently employs 30 employees, and it operates out of 1 office in Dunkirk. It was unquestionably the single Employer that included Cliffstar that had size leverage in effecting desirable insurance purchase costs.

In general, CTC's drivers (and later Edgewater's drivers leased from Vanguard and Shanlor) drove throughout the Northeastern part of the United States. As noted, they primarily hauled foodstuffs (palletized juices) for Cliffstar (though they also regularly hauled dog and cat food for Ralston-Purina). In that regard, it appears of record as required by (ICC) law, CTC had to carry fleet liability insurance in a minimum amount of \$750,000 (as did Edgewater later). However, it was as part of a Cliffstar insurance package that CTC carried fleet insurance in the amount of \$1 million liability, as well as \$100,000 cargo insurance, through Kreiner. Cliffstar carried its (prior) annual policy, which was to expire October 1, with Liberty Mutual Insurance Co. (Liberty). Liberty had had some problems (of undisclosed nature) with the State of New York. In any event, when Liberty had recently sought to increase its premiums, Cliffstar went shopping for its insurance (package), and it was able to timely obtain such insurance from another carrier, below.

Conlin acknowledged it was Cliffstar who had provided all the subpoenaed Edgewater fleet insurance policies in effect between October 7 and February 28, 1990. *Conlin revealed he had never even seen* the policies before (including the new policy that had been put into effect on October 2, that Conlin asserted had to be in place before Edgewater would take over. The prior nonobservance of such required insurance would but suggest that CTC's arrangement with Edgewater (which is not in evidence) may have from the start not been an arm's-length transaction and more that of a single employer. See *Hydrolines, Inc.*, 305 NLRB 416 (1991), where the Board observed, citing *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983), "[S]ingle employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies.'" In any event, whatever may have been Edgewater's initial status as Employer, the Board has determined the Respondent Company is a single Employer, one that included CTC and (at least) now Edgewater, and all are mutually responsible for the Board's and court-enforced Order, ordering Respondent Employer, amongst other things, to offer full reinstatement to and make whole all the former CTC unit employees.

Vanguard had not only required the insurance policy to be in place before Vanguard would supply any drivers to Edgewater, but in contrast with Edgewater, Vanguard's Robinson related he explored if the policy was in fact in place. The contract signed by Vanguard and Edgewater is in evidence (R. Exh. 3). It contains provisions for customer

(Edgewater) indemnification of liabilities *in excess* of insurance coverages (par. 11).

It also contains language (par. 8), whereby Vanguard has “sole control and responsibility for administering labor relations matters involving its employees,” and by which Vanguard is to hold customer harmless and language (identified as standard for Vanguard) by which customer Edgewater also holds Vanguard harmless from any liability whatsoever “arising out of or relating to the commission of any unfair labor or employment practice or wrongful termination by or at the direction of CUSTOMER, its employees or agents.”

CTC had retained Michel J. Conlin as a managing consultant earlier in June, and CTC had employed Conlin as such for about 4 months, thus essentially through September. CTC had notified the Union in June of its intent to cease transport operations. Conlin is also president of Edgewater, which was to take over. Sometime in August Conlin met with Vanguard’s officers David Constantino and Robinson in initial contract discussions to arrange for Vanguard to lease drivers to Edgewater, when CTC ceased its operations and Edgewater took over.

CTC ceased doing the transport business for Cliffstar (and Ralston-Purina) on October 6 (Friday). Edgewater commenced performing that transport service for Cliffstar (and Ralston-Purina) on October 9 (Monday), without any service interruption. In that regard, Robinson testified credibly that he always asks for 3–4 weeks (here four) as leadtime to get the required employees in place. However, Robinson’s assertion otherwise was that he was not aware of CTC’s shutdown of its operations when he started. That simply strained credulity. Prior business arrangements (in evidence) were as follows.

#### (1) Edgewater’s sublease of CTC’s trucking equipment

In the interim, in an asset purchase agreement (as so described of record, but not in evidence), Edgewater had agreed to lease 20 Kenworth trucks that CTC was then using on a truck lease with Chase Union. Conlin concedes that thereby in effect, Edgewater executed a sublease with CTC for the (20) trucks. Conlin also engaged another company (Shanlor) that used its own equipment, and which hired some of the same CTC former drivers, most notably two (Dale and Stuart) of the eight in group 3 with MVR difficulties, but who no less continuously hauled for Edgewater until 1990. They were (previously) dispatched by Edgewater, and covered by the same liability and cargo insurance (purportedly) to be supplied by Edgewater.

#### (2) CTC/Edgewater carrier insurance

Conlin was well aware of CTC’s and Edgewater’s insurance requirements. Conlin had learned of them from Scott Chapman, CTC’s chief financial officer (CFO), and Conlin has asserted that he sought Chapman’s help in getting the required insurance. Conlin also relates that his own (Edgewater’s) financial man, Dave Muscato, met with Liberty in September while CTC was still operating. Conlin also asserts that he retained Kreiner to obtain required insurance for Edgewater, but his testimony (above) about not seeing the policies seriously detracts from all such assertions.

Conlin related Edgewater (and CTC) had to have the (minimum) liability insurance to function as a trucking company.

Indeed, as part of its driver leasing contract signed September 5, but which notably was first discussed a month earlier, Edgewater agreed with Vanguard that Edgewater would provide such insurance coverage for the trucking operation (equipment) to be used by drivers subsequently to be leased from Vanguard. Conlin acknowledged that he (Edgewater) made no effort to reduce the liability coverage to minimum, asserting most customers require it. In other words, Cliffstar required it.

#### (3) Edgewater’s lease of Vanguard-employed truckdrivers

Vanguard is an independent personnel leasing company that employs some 1600 employees. Vanguard basically leases DOT-qualified tractor trailer drivers and warehouse personnel to major corporations throughout the United States. David M. Constantino is executive vice president of Vanguard. In early September, Constantino contracted with Edgewater’s president Conlin to provide Edgewater drivers.

On September 5, Edgewater entered into a contract with Vanguard under the terms of which, Vanguard was to pay and be reimbursed for all driver wages, benefits, and taxes paid to employees leased to Edgewater (but on the basis of a mutually agreed wage and benefit schedule for same), with a service charge of \$30 per driver week, or part thereof, identified as Vanguard’s profit. In so far as appears otherwise presently material, Vanguard was to provide necessary drivers to Edgewater, which was to provide the same insurance (as CTC supplied before) on the CTC leased trucking equipment, that the leased Vanguard drivers were to operate.

In that regard however, Conlin has significantly testified that the above liability insurance policy coverage had to be earlier arranged by Employer, or Edgewater wouldn’t have (sub)leased the trucks from CTC (nor thus leased the drivers from Vanguard). Conlin recounts that the required annual insurance (for 1989–1990) was in fact arranged through Kreiner (without lapse), and it was placed with AI Transport, a division of AIG Specialty Agencies, Inc., a Division of Insurance Company State of Pennsylvania (AIT). The new insurance policy was effective October 2. Conlin testified there was no provision made for Edgewater to be reimbursed for additional insurance costs.

#### (4) The CTC employees’ meeting with Vanguard and Conlin on September 11

Ronald Robinson is corporate manager and an assistant to the president of Vanguard. Robinson has been in the trucking industry since 1963. Robinson relates that Conlin requested (sic) that CTC did have some drivers performing the duties that Vanguard would be performing, and Conlin felt we should afford them an opportunity of employment first. Robinson clarified he didn’t discuss with Conlin whether everybody working for CTC could be hired through Vanguard, but only would Robinson consider (employing) them, and Robinson said yes.

Conlin relates (and Robinson confirmed) Conlin held a meeting of all the CTC drivers with Robinson on 8:30 a.m. on September 11 (Monday) at the Sheraton Inn in Dunkirk. Also present was Union Representative Tanner. However, CTC employee and Union Steward DiPietro testified credibly in rebuttal that the September 11 meeting was called as a

Company (CTC) meeting, and they (the CTC employees) were introduced to Robinson and Vanguard. Contrary to Robinson's recollection of having introduced himself, Conlin confirmed others that Conlin had first briefly introduced Robinson, and *Robinson said Edgewater had contracted with Vanguard to provide drivers to Edgewater*. Conlin recalls, *Robinson also said he was there to offer employment opportunity to the (then) CTC drivers for assignment to Edgewater*. Conlin testified that once that job offer was made, Conlin left, and Conlin didn't hear Robinson's discussion of Vanguard's rates of pay or benefits to be paid the drivers.

Tanner confirmed he attended the September 11 meeting. Tanner explained some drivers had called and notified him that there was an employment agency (Vanguard) conducting a meeting, and they (CTC unit employees) were directed to be in attendance at the Sheraton Inn. Tanner testified relatedly without contradiction that the Teamsters had had no prior formal notification that the CTC driver unit was (actually) being terminated. The drivers asked Tanner to attend the meeting, and Tanner did.

Tanner relates that after an initial exchange of business cards with Conlin, and an introduction, Robinson conducted the meeting. Tanner recounts: Robinson read from the standards of Vanguard, and he explained Vanguard's background and areas served. *Robinson said he was going to offer the (CTC) drivers the opportunity to make (employment) application with Vanguard, and he said if the drivers made application he would accept it that day, and if they didn't, he would provide Edgewater with adequate personnel from other Vanguard facilities. Robinson said that they would be operating Edgewater's equipment, hauling basically the same product, and he said he would make an effort to see they had the same tractor. Tanner recalled that at some point Robinson made it clear Vanguard was not a union company, and that Robinson said they had one facility that was Teamsters, but that this would not be a union operation.*

Robinson relates he told the group basically that Vanguard's set policy nationwide is: (a) the driver must have 2 years' of over-the-road driving experience; (b) be able to pass a DOT physical; (c) not have any more than two traffic violations in a 12-month period, and not more than five in 18 months; and (d) never be convicted of an alcohol-related or drug citation. *Though Robinson asserts he asked them to apply, he also told them to be eligible to be hired, they had to meet these qualifications.*

Robinson relates that he then went through the schedule of what Vanguard would be paying. At first Robinson asserted that he went through the benefits, though on later cross-examination Robinson (seemingly) inconsistently asserted he got as far as the pay scale, and the (CTC) drivers told Robinson to jam it, and no one then applied. According to Robinson they basically got up and left the room. They said they were going to a meeting with the Union at Days Inn.

Tanner more internally consistently, and thus credibly, recounts Robinson related the further Vanguard criteria which Robinson put forth as conditions for employment. Thus, Robinson said the mileage rate factor was 24 or 25 cents per mile. Robinson said the mileage rate carried in it per diem wages, and there was no separate per diem. Robinson also said Vanguard did not reimburse (sic) people for drops or hooks. Tanner recalled there was no discussion of holidays,

and Robinson went on to discuss Vanguard's criteria to be eligible to fill out an application. Tanner confirmed Robinson then said he expected any applicant to have 2 years of over-the-road experience. (Robinson asserted at hearing CTC's yard work qualified for such over-the-road driving experience, because they did more backing in than road drivers. However, Robinson has acknowledged he didn't say that at the time to the drivers.)

In contrast, *Tanner testified, Robinson said their MVRs could not have any serious violations or they would be wasting their time to make applications.* Tanner otherwise confirms that while Robinson was still presenting, the drivers started to exit, and Tanner did too. In that regard, Union Steward DiPietro recalled that *Robinson said the main qualification was that you had to have 2 years over-the-road driving experience, a clean record, no DWI, no DUI, no suspensions, no revocations, no major speeding violations, and if you don't have a clean license, don't bother to fill out an application here.* DiPietro summarized that *it wiped out 80 percent of them*, and those guys stood up, saying, *I got a DWI, or I got a major speeding violation, etc., and with drivers saying there was no reason for me to stay.*

DiPietro recounts he personally had a suspension and a revocation in 1982, and he barely had a year of over-the-road driving experience when he started with CTC. Contrary to Robinson's hearing asserted view, DiPietro testified credibly that he did not at the time view his yard experience as qualifying for the Vanguard required over-the-road driving experience. DiPietro confirmed that he was not told that.

Though Robinson had no recollection of a discussion about dispatch, Tanner has testified credibly that the dispatch procedure was one of the last subjects discussed. Thus Tanner relates that when he was at the doorway, the question was asked if it was going to be a *seniority dispatch*. Tanner heard Robinson reply it was going to be a *wheel dispatch*. Robinson does not deny it was to be a wheel dispatch, but recalls that it was said in connection with his interview of the Rumsey brothers, below. Whether said then also, I credit Tanner that Robinson said it in this meeting, in the manner described.

In that regard, Tanner testified credibly that a wheel dispatch gives the Employer the operational opportunity to utilize the equipment to its fullest, i.e., on a first-in, first-out basis, with use of the driver that has available log hours, regardless of seniority. On cross-examination Tanner confirmed, it keeps the equipment on the road, not sitting for a driver to become available.

DiPietro confirmed that they left and went to the Days Inn, as he recalled it, to give his testimony to the NLRB (on earlier filed charges). Most of the drivers left. However, DiPietro recalls there were a couple of drivers present from the area, who were there for an employment seminar. DiPietro thought three had remained, one of whom was a former CTC driver, Bobby Gregory. Gregory had a DWI (in 1983) and stayed to find out more information about why he was being disqualified by that.

Robinson said he had 25 job openings to fill. H. Rumsey, a previous CTC driver, but released before October 7, and not then employed by CTC, came by Robinson's room that afternoon, applied, and after a 3-hour interview was hired by Vanguard. Robinson relates H. Rumsey later that afternoon brought in his brother, J. Rumsey, who was (then) a CTC

driver (and later a discriminatee here), whom Robinson also then hired. Robinson subsequently hired three other former CTC drivers (discriminatees) at different intervals. Vanguard hired a total of five former CTC employees.

However, no former CTC driver that applied to Vanguard was not hired. The other three former CTC drivers that Vanguard hired for Edgewater were: Phillip Collato, Dennis Degolier, and Richard Gehling. (Conlin states Collato was later reemployed by Edgewater as a group 3 helper because of his MVR record. MVRs of Degolier and Gehling were clear.) Vanguard subsequently filled the remaining 20 driver positions through advertising in 3 local newspapers. All the above drivers hired by Vanguard drove exclusively for Edgewater.

#### (5) Edgewater's inquiries on insurance

Ron Lord is a loss control representative or investigator of AIT. On an admitted request of Conlin, AIT sent investigator Lord to Edgewater's office to look at (I find) the MVR records of the drivers who had previously worked at CTC. Conlin asserted that there was some interest on the drivers' part in going to work for Vanguard, which is in the main contraindicated in other of his testimony, and Conlin related on another occasion they (Edgewater, if not also Employer) wanted to know the viability of hiring former CTC drivers or hiring Vanguard. However, Conlin acknowledged that at first (when Edgewater took over), there was no question raised as to coverage of certain drivers. Conlin has more credibly explained, essentially in a consideration of a relationship with the Union in November, "[W]e wanted to know to what extent [how far] we could go, without disrupting our operation from [sic] having no insurance."

Conlin said he was not aware of AIT's guideline exclusions until receipt of Kreiner's December 1 letter from David F. Scott. Scott is vice president of sales for Kreiner. By letter dated December 1, Scott wrote Conlin reporting on Kreiner's receipt of AIT's "position on driver selection." In the letter Scott recounted, "DWI and DUI violations could seriously impair the viability of your insurance program." Scott enclosed a copy of a November 20 letter Scott received from AIT's branch manager, Robert F. Benton, along with that letter's enclosed violation list used by AIT to (generally) evaluate drivers' MVRs.

It listed 14 disqualifying major violations, including more materially:

1. DWI/DUI/Drugs/Possession of Controlled Substances.  
.....
4. Reckless driving.  
.....
5. Driving under suspended license.  
.....
6. Driving 15 or more miles per hour over posted limit.

The list made only a generalized reference to minor violations. It did relate MVR evaluation was required on all new drivers and that drivers were to be excluded if they had a major violation or a total of four other violations. Although this enclosure reflected an evaluation period of a license was to cover 3 years, subsequent record clarification of Conlin in-

dicates that the (MV) record is maintained in New York on a 3-year basis and current year. Conlin-AIT subsequent correspondence reveals that all drug- and alcohol-related violations remain on an MVR in New York for 10 years.

Rainey Turpin is director of safety for AIT. A Turpin letter to Conlin of November 29 clarified that minor violations, "are speeding less than 15 MPH over the limit, over weight, or over length violations that have not resulted in an accident." Turpin also listed as (additional) major violations, "following too close, improper passing, traffic signal violations or speeding in a school zone. Any MVR displaying DWI/DUI or reckless driving will require counseling with the driver. We require full details . . . . This driver will probably not be able to operate equipment we insure." Turpin did otherwise clarify generally two minor violations a year would not disqualify a driver. However, on a major violation or suspension, they did require a written verification of license reinstatement, and that the driver has been counseled concerning violations causing suspension.

Conlin relates he met with the Union at a (prior) hearing in the Federal Building, and Conlin asserts there was a joint expression of concerns about the MVR records of some drivers. Conlin relates that as a result, by letter dated December 20, Conlin made a specific inquiry of Turpin, with copy to Tanner, *inter alia*, on the eight individual drivers named in group 3, whose MVRs (in the above material periods of review) had shown one or more major violations of speeding, DWI, suspension, etc.

Conlin asserts they (still) felt they were having difficulty in pinning the insurance company down. In any event, by fax letter dated December 28, Conlin wrote Turpin and summarized Edgewater's understanding of AIT's prior position as follows:

(1) Drivers named on our previously furnished list, entitled [sic] "Enclosure A—Active MVR Summary—Potential Exclusions," except as modified by our letter of 12/27/89, are not to operate equipment insured by your company.

(2) Disregard of the above, by Edgewater Transport System, Inc., would impair the viability of our insurance program and/or could result in cancellation or refusal, by AIG, to renew our coverages.

The referenced December 27 letter of modification does not appear to be of record. Otherwise considered the drivers named in group 3 are shown to have had one (or more) of the claimed disqualifying major violation(s).

Ed Bird is vice president of underwriting for AIT. By fax letter of the *same* date, Bird wrote Conlin, stating that though the summarized paragraphs were not Turpin's words, "the paragraphs do basically reflect an accurate interpretation of Mr. Turpin's earlier correspondence."

By letter dated February 2, 1990, Conlin wrote Kreiner asserting that Edgewater was anxious to resolve the insurability of the above (eight) drivers previously determined unacceptable by AIT, as they were presently in a "make work" position at the drivers' pay, and that although Edgewater was not allowing the drivers to operate the vehicles, Edgewater was inundated with driver pressure, including threats and legal action.

Conlin testified in summary that at the time, Edgewater had a commitment to reinstate the drivers, but they felt they could endanger their insurance coverages if they allowed these eight drivers to operate the equipment. Conlin added when Edgewater made the January 17, 1990 offers of full reinstatement, limitedly to the eight helpers, it was partly because AIT might not renew in 1990, but also because AIT might cancel their insurance midstream.

By letter dated February 5, 1990, Kreiner's vice president Scott advised Conlin of Kreiner's inquiries made of five insurance companies, with four reporting back, and with three reportedly having already declined to consider Edgewater's account, and the fourth reporting, "their requirements for acceptability preclude drivers with three moving violations in the past three years, or two in the last 12 months." On the same day, the fifth insurance company notified Scott it also would be unwilling to pursue Edgewater's account.

By letter of February 9, 1990, as a result of Conlin's inquiry made on Union Representative Tanner's suggestion, Kreiner's Scott reported back that although the New York Auto Insurance Plan (assigned risk) premiums were feasible, there was (were) a \$500,000/and other limit(s), and that securing the remaining required amount of insurance in a London market made it not feasible overall.

Conlin, somewhat disjointedly in the time aspect, summarized that we had entered a bargaining process with the Union since November, but they weren't getting any place because of the severe headaches in trying to insure some of the drivers, that the drivers functioning as helpers were very unhappy, and the drivers were also costing the Employer a tremendous sum of money to pay them as helpers for doing little or no work. Conlin then testified:

So we finally reached the conclusion that the only way that we could restore order, if you will, and get things moving in a more positive direction, would be for me to sell the stock of the company Edgewater Transport, to Stanley Star, the former owner of Cliffstar Transportation Company (CTC), and in effect recall the drivers, which we did in January.

We then utilized Cliffstar's purchasing power and Edgewater, the entire group, which had much greater purchasing power than just Edgewater alone. Kreiner was then able to secure insurance for us with the Hartford Co.

It is readily apparent from the above in the end that just as when CTC had regularly obtained its carrier insurance in the amount desired by its main customer Cliffstar, namely, by the Cliffstar group purchase in amounts of \$1 million liability, and \$100,000 Cargo insurance from Liberty initially, and similarly from AIT to cover CTC briefly, and then Edgewater, when Cliffstar once again did so for the single Employer group as of February 5, 1990, the insurance was obtained and eight discriminatees readily fully reinstated, which was what the single Employer, which included CTC and Cliffstar, and (now) Edgewater was required to do from the start. I conclude and find that Employer's urged defense that Edgewater first hired the eight drivers as helpers because they were uninsurable is without merit.

Conlin acknowledged that in January 1990 (thus even before Edgewater's sale of stock to Starr on February 5, 1990),

Cliffstar, CTC, and Edgewater (and Cenco) were a single Employer. CTC, its successors and assigns, and indeed the previously determined single Employer owned an obligation to restore CTC operations and to fully reinstate the eight drivers in group 3 as drivers. Indeed, Edgewater concedes it was part of the single Employer when it had offered the reinstatement to drivers on CTC's behalf. It is clear in the end that all of the eight drivers initially employed by Edgewater as helpers from various dates in January were not fully reinstated as Employer's drivers until once again employed as drivers on February 24, 1990, and that the single Employer's belated group insurance support of these drivers as before that made that possible is no justification for the Employer's failure to have done what was necessary to earlier reinstate them with the others, as before.

Because neither CTC, Edgewater, nor the single Employer of which they are both part has shown sufficient justification for the Employer's failure to fully reinstate the eight discriminatees in group 3 before February 24, 1990, in agreement with the General Counsel and in accordance with the compliance specification (as amended), I conclude and find it follows that the gross backpay due the eight discriminatees in group 3 must be extended from October 7 through the date of employment as helpers, plus any difference in earnings they would have earned as drivers, from the time of their return and employment as helpers, until fully reinstated as drivers on February 24, 1990, and thus in the differential amounts above specified and determined accurate, plus interest. There are a few additional miscellaneous issues.

#### *e. Miscellaneous issues*

##### *(1) Medical expenses; premium payments; and offsets*

General Counsel correctly observes in brief that the Board customarily includes reimbursement of substitute health insurance premium and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost, and where the Respondent has failed to establish facts that would negate or mitigate its liability, documented medical expense during the backpay period should be reimbursed, *Roman Iron Works*, 292 NLRB 1292, 1293-1294 (1989).

If the medical expenses of group 1 discriminatee Robert J. Bush, and his dependent wife Helen, in the end appear not disputed in brief, it would appear some factual clarification is necessary in reconciling compliance specification claims with overlapping and somewhat duplicative billings submitted in support of medical expenses claimed by them. To the extent any uncertainties remain of record, they are to be resolved in favor of injured party, here employee (and his dependent), and against the wrong doer, *Iron Workers Local 15*, 298 NLRB 445 (1990), citing *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980).

##### *(a) Helen Bush*

Mrs. Bush regularly takes care of all the medical bills for herself and her husband. Mrs. Bush testified credibly she had the following (reoccurring) medical problems (associated with prior conditions of diabetes and/or blood pressure) treated in the material backpay period; that she followed all normal insurance policy rules in that regard, as she had in the past; and that the following treatment and/or service billings were always paid in the past under applicable medical cov-

erages of her husband's insurance carrier policy(ies) at work, namely, Community Blue (and the Community Blue Prescription Rider), under which they had no deductible. (They had co-payments which they made, and which do not enter into claims made here.)

<i>Service Date</i>	<i>Medical Procedures, Treatment, etc.</i>		<i>Amount</i>
11-25-89	Radiology		\$16.73
11-25-89	Medical Diagnostic	\$35.70	
11-25-89	Medical Diagnostic	36.05	
11-25-89	Emergency Room visit	23.50	
11-25-89	Other Medical	24.48	119.73
12-16-89	Peterson Drugs		39.64
12-25-89	Medical Diagnostic		
	[Profile SMA-6	15.50	
	Amylase	12.25	
	Urinalysis Compl.	12.25	
	CBC	20.20]	60.20
	Emergency Room visit	23.50	
	Other Medical	24.48	108.18
Total			\$284.28

Mrs. Bush testified credibly that in early 1990 her husband suffered a bowel obstruction illness, with associated breathing difficulty and poisoning throughout his system. Mrs. Bush testified, without contradiction, that it was a condition that would have been typically covered by their insurance. The insurance policies in evidence appear to support the same, and Employer does not establish the contrary. (Although Mrs. Bush acknowledged that her husband was hospitalized for 4 days, and incapacitated for a week, Employer did not claim in brief or otherwise establish base to exempt such period.)

(b) Robert Bush

<i>Service Date</i>	<i>Medical Procedures, Treatment, etc.</i>		<i>Amount</i>
1-10-90	Emergency Treatment		\$84.03
1-11-90	Summary Hospital Charges		
	Med-Surg-GY2-Bed	\$756.00	
	Pharmacy	3.60	
	IV Solutions	104.50	
	Med Surg Supplies	65.35	
	Clinical Laboratory	212.40	
	Dx X-Ray	228.35	
	EKG	24.35	1,394.45
1-11-90	Donald Gilbert, M.D.		
	Office visit	35.40	
	CUA	5.00	
	Hospital Initial	120.00	
	Hospital Followup	141.60	302.00
1-11-90	Silver Creek Medical Group		
	Josef Safar, M.D. General Surg. (Consult)		150.00

<i>Service Date</i>	<i>Medical Procedures, Treatment, etc.</i>	<i>Amount</i>
1-12-90	Radiology Hamburg Radiology Treatment	425.00
1-12-90	Edgar L. Bangsil, M.D. (EKG Reading)	28.00
Due over 30 days on 2- 25-90	Lakeshore Radiologists	138.00
Total		\$2,521.48

On the basis of the wholly credible testimony of Helen Bush that all the medical expenses submitted on her behalf in regard to her diabetes and/or blood pressure condition(s) in fourth quarter 1989 were of a reoccurring nature and had been previously paid by her husband's insurance policy at work, and on the basis of Helen Bush's equally credible testimony concerning the abdomen blockage illness of her husband in first quarter 1990, as also being covered by Community Blue (and Rider), and the insurance policies and bills in evidence fully supportive and indicating the coverage of the same and, especially in the absence of any clear showing to the contrary by the Employer, I therefore conclude and find all the above medical expenses are fully recoverable.

The total sum of medical expenses then due and payable to Robert Bush as calculated above is \$284.28 for his dependent wife in fourth quarter 1989 and \$2,521.48 for medical expenses in first quarter 1990 for himself (to which sums appropriate interest must be respectively added). The question remains whether the \$29 premium that Bush would have weekly paid for his own and dependent insurance coverage with Employer (or that paid by others) is to offset the amount of backpay otherwise shown due Bush (or others).

In that regard, CTC's discriminatees Small and Sternisha (group 2) elected to maintain an insurance coverage during their backpay period at their own cost. Premiums for such (in effect) replacement medical health insurance would be fully recoverable. Premiums expended by an employee for alternate insurance are recoverable, *Painters Local 277 (Polis Wallcovering)*, 282 NLRB 402, 403 fn. 10, 407 (1986). Such costs are claimed in the fourth quarter 1989 by Small and Sternisha. The accuracy of the amounts claimed is not in dispute. The issue here is whether such expenditures are also to be offset by any amount that they would have paid had they continued in CTC's employment, as urged by Employer.

At the outset some confusion of record appears in regard to required medical co-payments for service vis-a-vis for purchase of medical insurance. However, in the latter regard, General Counsel has clarified in brief:

During the course of the compliance hearing it was discovered that employees of CTC who elected to be participants in a health insurance policy were required to make co-payments. The parties stipulated that single employee coverage for Community Blue required a weekly co-payment of \$5.43 [Tr. 129] and family coverage required a weekly co-payment of \$29.00. [Tr. 60.] [Footnote omitted.]

Respondent Employer has relatedly urged that, because the General Counsel seeks an award for all out-of-pocket moneys paid by some employees for the continued health insurance coverage, the amounts of money that the discriminatees would have had to pay for continued health insurance following their termination by CTC, i.e., if they had continued in the employ of Respondent and not been terminated discriminatorily, should be an offset. Employer thus argues that because the theory of compliance is to make discriminatee whole, it is evident they should not receive an additional award for out-of-pocket expenses for amounts that they would have paid for the insurance in any event.

In his brief, the General Counsel acknowledges the Board has previously held insurance co-payments which would have been paid by a claimant during the backpay period may be deducted from net backpay if out-of-pocket medical expenses are being claimed, citing *Rice Lake Creamery*, 151 NLRB 1113, 1130 (1965), *enfd.* 365 F.2d 888, 893 (D.C. Cir. 1966); and *Sam Tanksley Trucking*, 210 NLRB 656, 659 (1974). General Counsel submits (somewhat ambiguously) that it would be appropriate to deduct the medical insurance co-payments from net backpay calculations for those employees *on whose behalf* out-of-pocket medical expenses are claimed.

In *Rice Lake Creamery*, *supra*, 151 NLRB at 1130–1131, (a) medical claims of two employees were simply disallowed, because their hospital and medical claims were less than what they would have paid to maintain insurance coverage absent the discrimination, and (b) medical claims of another employee were reduced by premiums that would have been paid up to point the (seemingly, amount) of medical expense loss. It was also noted, albeit arising in other context, the Board has held benefits received by discriminatees through the substitute insurance is proper offset on a claim against an employer for the same losses.

However, the employer there was *not* allowed by the Board to otherwise generally recover on the employer's claimed exposure to a general insurance risk for all employees, because discriminatees were deemed only being made whole for their (individual) loss suffered as a result of the discrimination practiced against them. Thus, a general setoff of the insurance premiums that would have been paid by all discriminatees was not allowed where the employer had provided no insurance generally. Although the court had there disagreed with the Board on this latter point, holding the company should be allowed to offset the amounts due to all discriminatees, if it is required to pay the claim of an employee to the extent his expenses exceed his premiums, *NLRB v. Rice Lake Creamery Co.*, *supra*, 365 F.2d at 893, the Board has continued to approve only a make-whole addressment of medical expenses minus premium payments, on an individual medical loss basis, e.g., *Sam Tanksley Trucking*, *supra*, 210 NLRB at 660–662.

The Board has relatedly had occasion to require a respondent employer to make employees whole by reimbursing employees for insurance premium differences (i.e., for premium costs exceeding employee contributory premiums) expended in securing comparable insurance, *Madison Courier*, 180 NLRB 781 (1970), but afforded the employee the option of not doing so, where it would minimize the loss to an employee. Thus, where the premiums payable would exceed medical expense benefits claimable, the projected benefit

coverage may be foregone, and the sums of the overriding expense that otherwise would be deductible from that employee's wages as contributions to the group insurance premiums retained, *Lloyd A. Frye Roofing Co.*, 161 NLRB 1420, 1426 (1966); and see *Sheet Metal Workers Local 418 (Young Plumbing)*, 249 NLRB 898, 900 fn. 9 (1980), where an employee received reimbursement for insurance premiums expended for substitute generally comparable insurance, and also recovered a medical expense not covered by the substitute policy, but one that would have been covered by the formerly enjoyed policy. In other words, it is the employee discriminatee who has long been afforded individual opportunity of any hindsight evaluation to minimize a loss associated with a previously denied policy coverage, not the respondent who by its unlawful conduct has denied all discriminatees of the benefit of coverage of the insurance plan.

Applying the above principles, Respondent's call for a regular deduction of \$29 that Bush would have paid weekly for his family membership coverage in Community Blue is allowed up to the amount of the medical loss. A similar regular co-payment premium insurance offset would appear appropriate on Small's and Sternisha's claims for the funds they expended in securing their own insurance, though neither of them has brought any medical expense claim against Employer, see *Sheet Metal Workers Local 418*, *supra*, 249 NLRB at 902; *Artim Transportation System*, 193 NLRB 179, 184 (1971).

Thus, I find the expense claim of \$276.69, as shown paid in fourth quarter 1989 by Small, represented premiums that Small paid for the described continued health insurance coverage that is in part a recoverable expense, i.e., to the extent it is "a payment Small would not have had to make except for the discrimination that was practiced against him." The sum of \$276.69 that was paid in fourth quarter 1989 is recoverable, minus however the sum of \$65.16 (12 weeks at Small's weekly co-payment cost of \$5.43), thus \$211.53 in net premium recovery.

Sternisha has a similar meritorious claim for \$313.89 due in the same quarter. As it appears that the above-conceded payments were made by these individuals as claimed in the fourth quarter 1989, e.g., for the last 2 months in fourth quarter 1989, and (in advance) for the first month in first quarter 1990, or in effect paid entirely in fourth quarter 1989 backpay period, I so find. Appropriate interest is to be added to all medical expenses and/or insurance premium reimbursements due these three employees. Insurance premiums will not be deducted from other employees as they make no claim and were provided no insurance by Employer.

## (2) Tractor depreciation

Finally, the parties are in dispute over the propriety of a claimed offset for tractor depreciation in 1989 as an interim earnings expense offset and over a similar claimed depreciation offset as (essentially) arising from a postbackpay period purchase of a newer truck in 1990 in Small's conduct of his self-employment trucking business.

Small presently operates as an independent trucking company under the name of J & C Leasing. Small had started a trucking business in 1985, but he wasn't active in it before CTC shut down. Small didn't drive the trucks himself, but leased them to others, though for quite some time (seem-

ingly) all of 1989, he had a truck or two just sitting around. On October 26, Small *purchased* a 1984 International tractor. Beginning November 20, and continuing to date, Small worked as an independent contractor personally hauling heavy machinery for Daily Express, Inc. (Daily) at a negotiated payment rate of 65 percent of the gross revenues charged, which continued through the backpay period in 1990.

In operating in that manner in last quarter of 1989, Small received gross revenues from Daily in the amount of \$4,606.89. The compliance specification had initially reported interim earnings for Small received from Daily in the amount of \$398 for fourth quarter 1989 (and \$578 in interim earnings for first quarter 1990), which Small explained at hearing was (were) his reported estimate(s) of his earnings at the time from what he had left after what he had spent. However, he had estimated and reported the earnings before his tax returns had been professionally prepared, at which time Small found they were "way over-stated," and thus General Counsel corrected them at the hearing.

General Counsel correctly advances it is well settled that a discriminatee may go into business for himself during the backpay period, *Synergy Gas Corp.*, 302 NLRB 130 (1991); *Ad Art, Inc.*, 280 NLRB 985 (1986); *Fugazy Continental Corp.*, 276 NLRB 1334 (1985); and, though the General Counsel be willing to admit interim earnings where appropriate, the burden remains that of a respondent to establish offset earnings, *Heinrich Motors*, 166 NLRB 783 (1967). If the undertaking in self-employment is an honest, good-faith effort to mitigate loss, it does not matter whether the effort is successful, *NLRB v. Cushman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955); *Lloyd Ornamental & Steel Fabricators*, 211 NLRB 217 (1974). Any net earnings (or profits) from such a business are interim earnings properly to be offset against gross backpay, *Rice Lake Creamery*, 151 NLRB 1113 (1965).

In *Ryder System*, 302 NLRB 608 (1991), an employer had excepted, pertinently: (1) to an administrative law judge's allowance of depreciation on a discriminatee's truck to be used to offset self-employment interim earnings, and (2) to a ruling that any recaptured assets on a trade-in would be offset by the amount of the initial investment the employee did not offset against the interim earnings.

The Board there (*id.*) observed a capital expense is not normally made a part of backpay calculations where the item has a resale value, and the use of the item potentially extends beyond the backpay period, citing *C. R. Adams Trucking*, 272 NLRB 1271, 1277 (par. 2) (1984), *enfd. per curiam* 767 F.2d 1276 (8th Cir. 1985). (In *Adams Trucking*, though an offset of principal was not allowed, offset of interest paid on loaned principal was allowed there as a necessary and ordinary cost of doing business, as also would have been depreciation if evidence of a fair standard of depreciation had been also presented, *id.* at 1277.)

In *Ryder System*, *supra*, the Board said that a truck as capital equipment should not have been included in the backpay specification as an item of reimbursible expense, nor (seemingly on that account) was a referenced asset recapture to be deemed relevant. The Board said relatedly that it will require a showing of the extent to which a trade-in on a second truck impacts on the backpay calculation, if at all, but expressed a doubt that a respondent would be liable for any amount

representing principal, and then expressed its belief that the truck, as capital equipment, should not have been included in the backpay specification as an item of reimbursible expense in the first place. Though remanding for required additional clarifications, the Board no less confirmed that depreciation on the truck is allowable expense. However, the Board even there relatedly stated it will require it to be made clear where the depreciation is actually entered into the backpay specification.

In *Brown Co.*, 305 NLRB 62 (1991), the Board affirmed an administrative law judge's findings that a discriminatee, who during the backpay period became self-employed, with the purchase of a tractor and a refrigerated trailer, could thereafter deduct from quarterly earnings of \$3130, expenses of operating the tractor, namely, principal (*sic*) and interest from the equipment, fuel, maintenance, repairs, and several different types of insurance, though doing so reduced net income to zero, because there was no evidence the revenues from self-employment had exceeded the cost of operation. (It is unclear what the base of principal expense may have been to seemingly qualify as an expense, though it may have been viewed as a business casualty loss, with theft of the first truck on December 1, 1977, *id.* at 28 fn. 9, if not referring to depreciation.)

Small's 1989 tax return (R. Exh. 1) reflects that despite reported gross revenues of \$4607 (rounded to nearest tax dollar) from Daily, Small operated his trucking business at a (claimed) loss of \$2502 in 1989. Substantially, but not exclusively contributing to that loss was a depreciation claim in the amount of \$2408.

The total depreciation amount of \$2408 was composed in part by a claim for depreciation on the 1984 International tractor Small had bought in late October for \$11,488, and which (in 1989 return) was reported, with use of a standard tax code recognized depreciation formula, namely, as depreciated over 3 years, with use of midquarter convention (MQ), on a double declining balance method (DDB), which generated a \$954 depreciation on that truck in 1989, an expense, in the circumstances of this case, shown clearly and fully expended in fourth quarter 1989. Employer at hearing did not appear to question the base of other claimed depreciation of \$677 and \$25 (on 5- and 7-year depreciable property, also using MQ convention respectively) nor a separate additional depreciation of \$752 claimed for a 1984 Ford van that was used 50 percent or more in Small's business.

The van, however, had been placed in service earlier in the year (May 1, 1987), and the claimed depreciation thereon would appear as then normally to be prorated, *i.e.*, for the last quarter basis (\$188), as would normally appear other expenses claimed in 1989, and identified as not an expenditure in fourth quarter 1989, where Small had operated the business in years past. However, Small testified that not only did he not work in the business in 1989, while working for CTC, but also he believed he didn't employ anyone else in the business in 1989 and that the trucks that he had had just lay unused until he was terminated, some time after which, he started the business up again.

In showing a net loss of \$2502 on gross revenues of \$4607, Small's schedule C (profit or loss) as submitted to the IRS reflects \$4701 is claimed in *other* expenses (*i.e.*, in addition to the \$2408 depreciation above), which are inclusive of the \$690 paid in interest in the operation of the business

(\$595 in mortgage interest to the bank and \$95 in other interest); \$662 for insurance (other than health); \$1053 for fuel (another major expense item which is only the more clearly indicated as expended in fourth quarter 1989); \$102 in tolls (similarly); \$111 for utilities; \$260 for taxes; and \$1155 expended for professional and legal services. Employer has not established that any of the above expenses were not incurred in connection with Small's resumed operation of his self-employment business in fourth quarter 1989.

It is clear from the above precedent and from the circumstances of Small's conducting his business only in the last quarter of 1989, the net loss was incurred in doing so, and I consequently find that Small had no reportable interim earnings in fourth quarter 1989.

As noted, Small had initially reported \$578 as income in the gross backpay period ending January 29, 1990. Small testified credibly that he worked steady for Daily in 1990. On gross revenues of \$64,150 received from Daily in 1990, Small has reported a net income from his trucking business of \$2580, which would prorate out at \$215 a month. (General Counsel's amended compliance specification for Small reflects \$208.33, but in brief he concedes it was generated on a 4-week projection on the interim earnings base of \$2500 rather than the \$2580 interim earnings base reported to IRS. In any event the General Counsel submits that the approach used by General Counsel is an appropriate measure of Small's interim earnings in first quarter 1990. In the end, I agree.

Small purchased a 1985-1986 Peterbilt tractor on May 14, 1990, well after the end of his backpay period, January 29, 1990, as determined above. A major expense claimed on calendar 1990 year income tax return was in the amount of \$24,987 for depreciation, which Employer appeared to have mainly contested at hearing. Though inquiring on fuel expenditures of \$18,767, the Employer did not appear to question the expenditure further. Indeed, other expenditures, as reported on the 1990 schedule C, appear to be reasonably proportionate on their face and to be of record essentially unquestioned. (E.g., if to be deemed questioned, reported interest of \$669 and \$3461 is in line with payments on the old truck and the new when purchased.) In any event I find them so, noting additionally that the Employer does not explicitly pursue any claim on Small's business interim earnings in brief.

Small related the purchase price of the Peterbilt tractor was (apparently) between \$41,500 and \$42,000 and, though he revealed that he had the bill of sale in his pocket, no party elected to make further inquiry on it. Small also testified he traded in the 1984 International tractor on the purchase of the Peterbilt tractor. Small's 1990 tax return (R. Exh. 2) reports the cost of the Peterbilt tractor at \$37,371 (thus presumably) with the International trade-in discounted. In any event, Small's 1990 declared section 179 depreciation on the Peterbilt tractor was \$2580. Total and *elected* section 179 depreciation (inclusive of \$2580) was \$9690. (The latter figure included a *rebuilt* engine purchased for the Peterbilt on August 1, 1990, for \$6384, which was claimed entirely depreciable that year, as was a \$726 computer expense.)

MACRS depreciation on the Peterbilt tractor was additionally then claimed on the basis of \$34,791 (i.e., on the base cost of \$37,371 less claimed sec. 179 Peterbilt truck depreciation of \$2580) over a 3-year period with half-year conven-

tion (HY) and DDB method used, generating an additional \$11,596 depreciation deduction on the Peterbilt. Notably Small has claimed \$3391 in depreciation deductions for assets placed in service before 1990, accounting for the total overall depreciation claim of \$24,987 in 1990. (The \$3391 presumably would include depreciation claimed on the International for its use between January 1 and May 14, 1990, when it was traded in on the purchase of the Peterbilt.)

The General Counsel admits in brief that a question arises as to what credit should be given to depreciation allowances which did not exist until after the backpay period. In cross-examination, Small had acknowledged he did not claim (on the tax form) any depreciation on the Peterbilt tractor before he acquired it. In brief, the General Counsel presumed the Employer would urge assessment of gross profit, on a pro rata basis, with a depreciation allowance only on the older truck (one subsequently traded-in). However, General Counsel asserts a problem exists in doing that because no evidence is presented on what cash receipts Small had on his accounts receivable in the January backpay period, noting Small operated on a cash basis. On examination by General Counsel, Small testified that he knew of no other way to estimate his earnings in January, other than on pro rata base approach of his earnings in 1990. Finally, the General Counsel argues that to attribute gross income on a pro rata basis, while denying Small the benefit of a depreciation allowance on the same basis seems inherently unfair and thus urges the approach used in the compliance specification, as amended, as an appropriate method to estimate Small's interim earnings.

Essentially, in arriving at Small's backpay due in first quarter 1990, the General Counsel has used a formula that is based on the entire 1990 net earnings to establish pro rata interim earnings for but the first month of that year. The large postbackpay period is one in which Small had substantial gross income, but was one in which he purchased substantial new equipment that contributed to the production of the substantial gross income that he had that year and thus was a period involving substantial concomitant expense.

Employer does not present any alternate base to establish net backpay in first quarter 1990. Indeed, Employer is hard put to establish an approach contrary to that advanced by the General Counsel. E.g., if fourth quarter 1989's base of gross backpay were projected forward to produce a pro rata alternative gross backpay formula, a projection of fourth quarter 1989 truck expenses, which would but then fairly follow, would lead to *no* interim earnings. Thus, I conclude General Counsel's formula, which provides pro rata projection of income for January on basis of 1990 net income, gross income less expenses, is fair and reasonable under all the circumstances, which may account for Employer's failure to continue to urge the contrary in brief. In any event I find Small had \$215 interim earnings in first quarter 1990.

The final issue to be addressed is Employer's primary contention that no backpay is due any discriminatee because they have all failed to mitigate their damages, by failing to accept the substantially equivalent employment that was timely offered them. This remaining issue has several facets, which may now be addressed and finally resolved.

Analysis, Conclusions, and Findings on Employer's  
Primary Defense on Failure to Mitigate

Respondent Employer primarily contends that by failing to apply for the Vanguard positions offered CTC employees on September 11, the majority of the discriminatees failed to mitigate their damages from the start on October 9, as was required, with declared reliance on *Continental Insurance Co.*, 289 NLRB 579 (1988). Respondent also argues in brief there can be little question positions offered by Vanguard were substantially similar to those previously enjoyed by CTC drivers, who would be working under the same supervision; driving the same equipment; servicing the same customers; and, so Employer urges, working under the same dispatch system. Employer's related contention is Vanguard's nonunion status does not mean the jobs offered were not substantially similar, with reliance stated on basis of, see e.g., *Electrical Workers IBEW Local 3 (Macy & Co.)*, 275 NLRB 990, 991 (1985).

In *Continental Insurance*, in a 2-to-1 panel decision, the Board held that one of the discriminatees, who had talked to the company about employment opportunities elsewhere, had then refused to accept the company's offer of similar employment (waitress) at another location of the company. The Board found that the employee's claim the job offered was too far to travel on the salary being offered was without any supportive specification and was unavailing. The employee there also unsuccessfully claimed personal preference not to use the subway, because the job offered was found to be a day-shift job, when the subway was well traveled by others.

General Counsel would distinguish *Continental Insurance*, on the basis that Vanguard's offer was made while the employees were employed by CTC, and would be so for another month. General Counsel contrarily contends that Respondent, having admitted that the liquidation of CTC and sale of its trucking operation to Edgewater, which resulted in the termination of drivers and the elimination of the CTC unit, was in violation of the Act, now takes the curious position the CTC employees' refusal to cooperate in this unlawful transfer amounted to a willful loss. General Counsel would note the Union had already filed charges on CTC's threatened unlawful activity.

In contrarily submitting CTC employees who failed to apply for positions with Vanguard did not suffer willful loss, General Counsel relies on the subsequent Board holding in *MPC Plating, Inc.*, 295 NLRB 65 (1989), where an administrative law judge found, and the Board agreed, that employees were unlawfully required to switch from being employees of the employer to being employees of a temporary agency and that the employees were being asked to abandon their Section 7 rights, as the transfer was designed to eliminate the union. General Counsel urges such is the case here, observing employees were told to work for Vanguard and Edgewater would mean it was a not a union job.

In agreement with General Counsel, I am persuaded in the end the instant case on its dispositive facts is closer to, and thus is to be deemed governed by, the Board's later holding in *MPC Plating*, supra, 295 NLRB footnote 8, where the respondent had continued to carry on all of its operations, at times with its own permanent work force, and at times using temporary employees supplied by other employers, rather than the unique circumstances the Board had earlier addressed in its holding in *Continental Insurance*, supra, where

one of several discriminatees, on personal inquiry of the employer about alternative similar employment as a waitress, was afforded such an opportunity, and then declined it without advancing any reasons deemed sufficiently supportive for doing so.

In contrast, CTC employees were here presented with an offer of future employment, at a time when they were still employed by CTC (against whom they had filed related charges), without having requested it, indeed offered the jobs a month before what was to be their discriminatory discharge by CTC. The offer was from a stranger temporary service company, but one admittedly only doing so at the request of another company that had already agreed with their Employer CTC to sublease all CTC's trucking equipment from their Employer, who had even before then announced, and had thereby already entered into a course of conduct, process, or arrangement with Edgewater that would lead to Employer's conceded unlawful future termination of their employment and to the destruction of the CTC unit theretofore established appropriate for collective bargaining.

Moreover, I find Employer's reliance on *Electrical Workers IBEW Local 3 (Macy & Co.)*, supra, 275 NLRB 990, (1985), is misplaced. There the Board found an employee who had not obtained interim employment in some 4 months did not demonstrate a good-faith effort to find interim work, in that during the backpay period he had failed to follow up on certain job listings in his classification (maintenance electrician) because he believed them to be nonunion jobs, without evidencing any degree of circumspection in that matter, and otherwise having only perfunctorily made a few suggested job inquiries. Here in contrast Employer not only did not bargain with the Union about the above changes Employer made, but rather the (future) discriminatees were told the job opportunities they were then being offered by Vanguard at Edgewater's request were to be in a nonunion job.

Thus, in basic agreement with General Counsel, and apart from any urged consideration Employer is improperly attempting to litigate an element of the violations it settled and agreed to remedy, I conclude and find it would be an anomaly to require the discriminatees here to have prematurely accepted such an improper job offer condition, namely, that the job offered was to be accepted as nonunion or, if declined, they will have forfeited any rights to backpay, *MPC Plating*, supra. Cf. *Worcester Mfg.*, 306 NLRB 218 (1992); and see also *Continental Winding Co.*, 305 NLRB 122 (1991). The Board has long held an employee discriminatorily discharged as a result of an employer's attempt to transfer the employee from his job to a less desirable job is under no duty to mitigate backpay by acceptance of the demotion, *Century Broadcasting Corp.*, 189 NLRB 432, 433 (1971).

General Counsel has further argued, unlawful scheme aside, the Vanguard offer was not an offer of equivalent employment. It appears General Counsel contends that Employer failed to establish that employees refused jobs that an employer (Vanguard) would have actually offered them. Cf. *Halpak Plastics*, 301 NLRB 690 (1991). In any event, General Counsel argues that Vanguard imposed qualifications which virtually eliminated the entire unit from consideration, and both its requirement of 2 years of over-the-road driving and the requirement of having a clean driving record wiped out most of the CTC drivers. General Counsel argues that though encouraged to apply for jobs, the qualifications laid

out by Robinson on behalf of Vanguard made it quite clear virtually all the employees did not qualify for a job and therefore would not have been hired.

Respondent contends General Counsel cannot argue persuasively that it was futile for the employees to have applied with Vanguard on any urged basis that Vanguard's hiring standards would have precluded employment of the CTC drivers because of their poor driving records, because Robinson's testimony showed he simply told CTC drivers of Vanguard's normal hiring practices (which was to require) 2 years' driving experience, physical fitness, and no more than two traffic violations in 12 months. Employer further argues this didn't excuse the discriminatees' failure to even apply for employment, particularly where Robinson had traveled there to give them first chance to be hired. And, where they walked out in the middle of the presentation, Respondent Employer argues it does not behoove discriminatees to now urge the offer was unsatisfactory. Finally, Employer argues each of the five (sic) CTC drivers that later applied were hired, quite apart from their poor driving records, thus showing Vanguard was seeking to hire employees, and their hire corroborates the validity of Vanguard's offer of employment to CTC drivers.

All Employer's arguments in this area are simply not persuasive and are without merit. What is centrally inescapable is that when the offer of Vanguard jobs was made, Robinson not only told all the assembled CTC drivers what the MVR preconditions for Vanguard employment were, Robinson also told them, that if the employees didn't meet the MVR conditions they shouldn't waste their time in applying. A driver uproar then occurred as 80 percent of the assembled CTC drivers concluded that they did not meet the required qualifications. Such declared, and understood practical restriction on employment opportunity does not indicate employees engaged in subsequent willful loss of earnings. When later terminated, many did secure gainful employment.

Respondent contends the Vanguard wages and benefits offered were superior, and, although there were a few differences in the benefit structure, the differences were insignificant. Respondent would rely on yard drivers being paid 31 cents more per hour, with 10-15 hours overtime in a normal week, in contrast with CTC drivers, who, so Employer urges, did not receive overtime. The Respondent argues that the focal point of the inquiry should be the overall offer of employment in connection with the total wages and benefits payable to the employees.

In contrast General Counsel argues the job offer of Vanguard made it appear clear that employees would not have insurance for their first 30 days of employment, the vacation policy was radically different, they would have fewer (6 rather than 10) holidays, and their compensation would be less. General Counsel argues the substantial effect of same is made clear from the observed differences in the earnings of those who were employed by Vanguard as compared with their prior average weekly earnings while employed by CTC.

Again I find General Counsel's arguments the more persuasive. I note and credit DiPietro's additional testimony that at the time of termination, and since the prior release of some three yard men, he had substantial overtime (as much as 20 hours a week), though he couldn't say what the other yard drivers had averaged in overtime. I also credit Tanner that wheel, not seniority dispatch, was to apply, which would have direct effect on the earnings of specific over-the-road drivers.

Vanguard did not pay per diem as such. Although Vanguard informed the CTC drivers that Vanguard would pay the over-the-road drivers at the base rate of 25 cents per mile, which included a per diem allowance, the over-the-road drivers were presently paid 20 to 24 cents, depending on length of service, with half of the CTC drivers paid at 24 cents. Vanguard did not pay \$15 for pickups and deliveries as did CTC; nor did it pay the \$10 extra to DiPietro (and others) when he (they) hauled freight between plants in Buffalo, New York, or Erie, Pennsylvania. Former CTC drivers with 2-3 weeks of vacation would now receive 1 week from Vanguard. There were substantial insurance changes.

General Counsel acknowledges there comes a time when an employee must lower his sights and accept something less desirable than the position he held with Respondent, but he persuasively argues CTC employees had not reached that point here. It is clear enough to me and I find that there were substantial differences in pay, benefits, and conditions in the terms offered by Vanguard, as compared with what the CTC employees already enjoyed before any bargaining was accomplished on these changes, let alone on matters looking for a first contract between CTC and the Union. I further find that CTC employees did not incur willful loss of earnings in not accepting Vanguard's offer of employment on that account.

For all the above reasons, I am wholly persuaded that CTC employees did not incur any willful loss of interim earnings in not applying for work with Vanguard as primarily contended by Employer. Thus I need not address General Counsel's reliance on still further arguments: the Vanguard job was just one job opportunity, and it is not consistent with Board law that a discriminatee has to accept one particular job offer; Employer has conceded there was a general good-faith search for interim employment on the part of CTC employees and/or Employer's position is contradictory in that it fails to recognize that some of the discriminatees had worked for interim employers during the backpay period, and they had fulfilled their obligation to search for and accept job offers; and the Board does not require that employees apply for every possible job opportunity that might be available, *Lundy Packing Co.*, 286 NLRB 141 (1987).

#### D. Backpay Due

Accordingly, the following employees will be made whole by payment of the total amount of backpay shown opposite their names, with appropriate interest.

<i>Name</i>	<i>Group</i>	<i>Avg. Wkly. Earnings</i>	<i>Wks.</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Less Int. Earnings</i>	<i>Net<sup>2</sup> Backpay</i>	<i>Total</i>
Beebe, Arthur	3	\$653.60	12	89/4	\$7,843.20-	- 0 -	\$7,843.20	
		"	3	90/1	1,960.80-	- 0 -		
		Helper Diff.		90/1	775.40-	- 0 -	2,736.20	\$10,579.40
Beebe, Timothy	1	702.45	12	89/4	8,429.40-	\$3,385.22	5,044.18	
		"	3	90/1	2,107.35-	1,464.55	642.80	5,686.98
Boye, Bill	1	701.05	12	89/4	8,412.60-	- 0 -	8,412.60	
		"	3	90/1	2,103.15-	- 0 -	2,103.15	10,515.75
Bush, Robert	1	846.20	12	89/4	10,154.40-	- 0 -	10,154.40	
		"	3	90/1	2,538.60-	- 0 -	2,538.60	
		Med. Exp. H. Bush		89/4		284.28		
		- Ins. Prem.		89/4	-(12 x \$29)-	348.00	- 0 -	
		Med. Exp. R. Bush		90/1		2,521.48		
		- Ins. Prem.		90/1	-(4 x \$29)-	116.00	2,405.48	15,098.48
Calato, Phillip	3	623.80	12	89/4	7,485.60-	1,503.95	5,981.65	
		"	3	90/1	1,871.40-	- 0 -		
		Helper Diff.		90/1	1,111.00-	- 0 -	2,982.40	8,964.05
Dale, Daniel	3	708.10	12	89/4	8,497.20-	1,901.00	6,596.20	
		"	4	90/1	2,832.40-	- 0 -		
		Helper Diff.		90/1	596.00-	- 0 -	3,428.40	10,024.60
Degolier, Dennis	1	720.30	12	89/4	8,643.60-	4,611.65	4,031.95	
		"	3	90/1	2,160.90-	1,540.21	620.69	4,652.64
DiPietro, Louis	1	473.20	12	89/4	5,678.40-	- 0 -	5,678.40	
		"	3	90/1	1,419.60-	- 0 -	1,419.60	7,098.00
Gehling, Richard	2	419.83	12	89/4	5,037.96-	4,648.00	389.96	
		"	4	90/1	1,679.32-	2,207.88	- 0 -	389.96
Gregory, Bobby	3	917.95	12	89/4	11,015.40-	- 0 -	11,015.40	
		"	4	90/1	3,671.80-	- 0 -		
		Helper Diff.		90/1	781.80-	- 0 -	4,453.60	15,469.00
Hall, Carter	1	749.33	12	89/4	8,991.96-	- 0 -	8,991.96	
		"	3	90/1	2,247.99-	- 0 -	2,247.99	11,239.95
Higbee, Leslie	1 (2)	537.18	12	89/4	6,446.16-	- 0 -	6,446.16	
		"	3	90/1	1,611.54-	- 0 -	1,611.54	8,057.70
Keefe, Kevin	1	457.90	12	89/4	5,494.80-	239.00	5,255.80	
		"	3	90/4	1,373.70-	- 0 -	1,373.70	6,629.50
Lamphere, Jesse		422.78	11	89/4	4,650.58-	- 0 -	4,650.58	4,650.58
Nephew, Marvin	1	700.58	12	89/4	8,406.96-	- 0 -	8,406.96	
		"	3	90/1	2,101.74-	- 0 -	2,101.74	10,508.70
Nephew, Wayne	3	357.15	9.5	89/4	3,392.93-	- 0 -	3,392.93	
		"	3	90/1	1,071.45-	- 0 -	1,071.45	
		Helper Diff.		90/1	- 0 -	- 0 -	- 0 -	4,464.38
O'Conner, Gene	1	522.53	12	89/4	6,270.36-	- 0 -	6,270.36	
		"	3	90/1	1,567.59-	- 0 -	1,567.59	7,837.95
Ozga, Robert	2	858.10	12	89/4	10,297.20-	3,564.00	6,733.20	

<i>Name</i>	<i>Group</i>	<i>Avg. Wkly. Earnings</i>	<i>Wks.</i>	<i>Qtr.</i>	<i>Gross Backpay</i>	<i>Less Int. Earnings</i>	<i>Net<sup>2</sup> Backpay</i>	<i>Total</i>
		"	4	90/1	3,432.40-	2,143.00	1,289.40	8,022.60
Piazza, Mark	1	740.35	12	89/4	8,884.20-	2,502.29	6,381.91	
		"	3	90/1	2,221.05-	2,011.45	209.60	6,591.51
Reed, James	3	488.00	12	89/4	5,856.00-	2,011.45	3,844.55	
		"	3	90/1	1,464.00-	483.42	980.58	
		Helper Diff.		90/1	- 0 -	- 0 -	- 0 -	4,825.13
Rumsey, John	1	614.15	12	89/4	7,369.80-	5,763.28	1,606.52	
		"	3	90/1	1,842.45-	1,319.67	522.78	2,129.30
Shuart, Dennis	3	712.58	12	89/4	8,550.96-	598.08	7,952.88	
		"	3	90/1	2,137.74-	- 0 -		
		Helper Diff.		90/1	789.32-	- 0 -	2,927.06	10,879.94
Sikorski, David	2	774.38	12	89/4	9,292.56			
		Bonus		89/4	1,000.00-	1,974.00	8,318.56	
		774.38	4	90/4	3,097.52-	1,613.00	1,484.52	9,803.08
Small, Gerald	2	641.65	12	89/4	7,699.80-	- 0 -	7,699.80	
		Med. Prem-Offset		89/4	276.69-	65.16	211.53	
		641.65	4	90/1	2,566.60-	215.00	2,351.60	10,262.93
Sternisha, Jeffrey	2	742.55	12	89/4	8,910.60-	6,139.26	2,771.34	
		Med. Prem-Offset		89/4	209.26-	65.16	144.10	
		742.55	4	90/1	2,970.20-	1,744.83	1,225.37	
		Med. Prem.		90/1	104.63-	21.72	82.91	4,223.72
Sutter, Roger	1	748.00	12	89/4	8,976.00-	- 0 -	8,976.00	
		"	3	90/1	2,244.00-	- 0 -	2,244.00	11,220.00
Tenamore, Russell	3	771.43	12	89/4	9,257.16-	1,144.71	8,112.45	
		"	4	90/1	3,085.72-	- 0 -		
		Helper Diff.		90/1	993.29-	- 0 -	4,079.01	12,191.46
Ulrich, William	2	789.45	12	89/4	9,473.40-	5,168.92	4,304.48	
		"	4	90/1	3,157.80-	1,500.00	1,657.80	5,962.28
Yonkie, John	2	664.25	12	89/4	7,971.00-	3,192.00	4,779.00	
		"	4	90/1	2,657.00-	2,291.73	365.27	5,144.27

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

It is ordered that the Respondent, Cliffstar Transportation Co., Inc. (Star Cos., Inc.); Cliffstar Corporation; Cinco, Inc.; and Edgewater Transport Systems, Inc., single employer, their officers, agents, successors, and assigns, shall jointly and severally make whole the above-named employees in section D above by payment of the amounts set opposite their names, less applicable tax deductions, and with the appropriate interest to be computed until date paid, in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>2</sup>To these quarterly net backpay figures and other recoverable sums must be added the appropriate interest.

<sup>3</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.